IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 1981

IN THE MATTER OF

FRANK S. BLACKFORD, as Trustee in Bankruptcy of MUNRO-VAN HELMS COMPANY,

Petitioner,

vs.

COMMERCIAL CREDIT CORPORATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
I. Petition for Writ of Certiorari	1
(a) Opinions Below	1
(b) Jurisdiction	2
(c) Questions Presented For Review	2
(d) Constitutional Provisions and Statutes involved	4
II. Statement of the Case	5
(a) The general nature of the action and basis for Federal jurisdiction in the Court of first instance	5
(b) The Bankrupt and its Estate	5
(c) Bankrupt's transactions with Commercial Credit Company, Inc. of Maryland	5
(d) The basic allegations of Claim 15	7
(e) The theory of Claim 15	8
(f) Bankrupt's transactions with the Respondent Commercial Credit Corporation	8
(g) Judgments of the Courts below	19
III. Argument	20
1. The purpose of the Alabama Assignment of Accounts Receivable Act is twofold: (1) To facilitate the pledge and sale of accounts receivable, and (2) to eliminate fraud in connection with secret assignments	20
2. Where a foreign corporation had its principal place of business in another state, but had specified as its principal place of busines in Alabama the City of Montgomery, under the requirements of the Constitution and Statutes relating to foreign corporations, and where such corporation has several places of business in	

Page

Alabama, including Montgomery, the principal place of business of such corporation is Montgomery, within the meaning of the recording laws of the State of Alabama 22

3. Where the Alabama Assignment of Accounts Receivable Act provides that assignments executed thereunder shall be inoperative against the creditors of the assignor, without notice, unless a statement is filed thereunder, giving, among others, the name of the assignee and its principal place of business in Alabama, if any, such requirement is mandatory; and the failure by the assignee, having such a place of business, to designate it in the statement filed renders such filing inoperative against the Trustee in Bankruptcy of the assignor 27

4. An assignment by a debtor to a creditor of account receivable purporting to vest the absolute title thereto in the creditor but which was intended by the parties to operate merely as security for a debt, is wholly void as to creditors of the assignor, regardless of the intent of the parties 34

5. The assailed assignments are void under Section 7, Title 20, Code of Alabama 40

IV. CONCLUSION 43

Appendix Appendix 1

Page

Cases Cited

Adkins v. Bynum 109, Ala. 281, 19 So. 400 3, 40

Ala. Clay Products Co. v. City of Birmingham, 148 So. 328, 226 Ala. 631 22, 26

Armstrong v. Miller, 189 So. 74, 238 Ala. 17 39

Barnes v. Lynn, 221 F. (2d) 955 22

Bryant v. Young, 21 Ala. 264 37

Butts v. Valerie Construction Co. et al, 259 N.Y. Supp. 93 28

Calkins v. Lichtig, 251 F. 844 36

Campbell v. Davis, 4 So. 140, 85 Ala. 56 39

Cobb v. Central of Georgia Ry. Co., 93 So. 845, 208 Ala. 134 22

Corn Exchange National Bank & Trust Co. v. Klauder, 318 U.S. 434, 63 S. Ct. 679, 87 L.Ed. 844 20

Costello v. Bank of America National Trust & Savings Association, 246 F. (2d) 807 21

Duncan v. Rudulph, 16 So. (2d) 313, 245 Ala. 175 40

Durkin v. Durkin, 133 Cal. App. (2d) 283, 284 P. (2d) 185 21

Edmund J. Rappoli Co., Inc., 169 N.Y. Supp. (2d) 376 28

Fairbanks Steam Shovel Co. v. Wills, 36 S. Ct. 466, 240 U.S. 642 22

	Page
General Motors Acceptance Corp. v. Haley, 109 N.E. (2d) 143	28
Gillespie v. McCleskey, 49 So. 362, 160 Ala. 289	41
Howe v. Simison, 81 So. 837	28
In Re Brownsville Brewing Co. v. Meyer Mfg. Co., 117 F. (2d) 463	28, 33
In Re National Mills, Inc. 133 F. (2d) 604	28
In Re Yost et al., 107 Fed. Supp. 432	32
Landy v. Nicholas, 321 F. (2d) 933	21
Lewis v. Bank of Mobile, 87 So. 176	34
Mitchell v. Conway 60 So.(2) 676, 257 Ala. 648	44
Morton Hardware Co. v. Barranco, 172 So. 109	34, 39
O'Neal et al v. Birmingham Brewing Co., 13 So. 576, 101 Ala. 383	34, 39
Pace et al v. Wainwright, 10 So. (2d) 755	34
Robinson v. McElliot, 22 L. Ed. 738, 22 Wall. 513-27	36
Ruse et al v. Bromberg, 7 So. 384, 88 Ala. 619	34
Sandlin v. Robbins, 62 Ala. 477	39
Second National Bank of Houston v. Phillips, 189 F. (2d) 115	21
Sullivan v. Sullivan Timber Co., 15 So. 901, 103 Ala. 605	22, 26
Tezel & Cotter v. Roark, 301 S.W. (2d) 179	26

Page

Townsend v. Little, 27 L. Ed. 1012, 109 U.S. 504 26

Truitt v. Crook, 30 So 618, 129 Ala. 142 34

United States of America v. The Suring State Bank, 150 Fed. Supp. 60 28

STATUTES CITED

Title 39, Section 207 et seq., Code of Alabama, 1940 4, App. 40

Sections 60 (a) and 70 (c) and (e) of the Bankruptcy Act. 4, App. 54

Sections 1 and 7, Title 20, Code of Alabama, 1940 4, 39 App. 41

Section 232, Article 12, Alabama Constitution of 1901 4, App. 48

Section 192, Title 10, Code of Alabama, 1940 4, App. 48

Section 340, Title 51, Code of Alabama, 1940 4, App. 49

Section 345, Title 51, Code of Alabama, 1940 4, App. 49

Section 341, Title 51, Code of Alabama, 1940 4,

Acts of Alabama, 1940, p. 503 4, App. 40

Title 47, Section 132 (8), Code of Alabama, 1940 4, App. 52

Title 39, Section 191, Code of Alabama, 1940 4

Title 9, Sections 60, 65, Code of Alabama, 1940 App. 51, 52

Page

TEXTBOOKS CITED

Ann. 68 A.L.K. 306 39

Koessler, New Legislation Affecting Non-Notification Financing of Accounts Receivable, 44 Michigan Law Review, 563 32

23 R.C.L. 171, Section 24 31

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To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

I.

The Petitioner prays that a Writ of Certiorari issue to review that part of the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause, affirming in part the judgment of the District Court in this cause.

(a) OPINIONS BELOW

The opinion of the District Court (R. p. 593) has not been reported.

The opinion of the Court of Appeals (R. p. 618) has been reported in 263 F. (2d) 97. A copy is appended as Appendix I.

(b) JURISDICTION

(i) The judgment of the Court of Appeals is dated January 23, 1959, and was entered on January 23, 1959 (R. p. 656). A copy is appended as Appendix II.

(ii) The petition for rehearing was denied on April 10, 1959, (R. p. 744). A copy is appended as Appendix III.

(iii) The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code Annotated, Section 1254(1), and Title 11, United States Code Annotated, Section 47(c).

(c) QUESTIONS PRESENTED FOR REVIEW

(i) Where Alabama Assignment of Accounts Receivable Act provides that assignments of accounts receivable shall be inoperative against creditors without notice, unless a statement is filed by the assignee in the Probate Office where the assignor's principal place of business is located, giving, among others, the assignee's name and principal place of business, within the state, if any; and, where assignee, a foreign corporation, qualified to do business within the state, has a principal place of business therein and fails to designate it in the statement filed pursuant to said Act, but instead, gives its principal place of business outside the state, is the filing defective and invalid against the Trustee in Bankruptcy of the assignor under Sec-

tions 60(a) and 70(c) and (e) of the Bankruptcy Act, as amended?

(ii) Does the Alabama Assignment of Accounts Receivable Act, making assignments of accounts receivable inoperative against the creditors of the assignor, without notice, unless a certain statement is filed for record by the assignee, abrogate the long-established public policy and general system of statutory and judicial la wof the State prohibiting, as fraudulent, absolute conveyances intended merely as security, where the Assignment of Accounts Receivable Act not only fails to repeal the Alabama laws relating to fraudulent conveyances, but expressly provides that it shall not be construed as repealing any other laws effective in Alabama relating to the subject matter covered by the Act?

(iii) Is a claim in a plenary suit by a Trustee in Bankruptcy to set aside alleged fraudulent assignments of accounts receivable, given pursuant to the Alabama Assignment of Accounts Receivable Act, subject to summary judgment in favor of the Defendant, as failing to present a genuine issue of "a debtor intending to defraud," within the meaning of **Adkins v. Bynum**, 109 Ala. 281, 19 So. 400, where it is alleged that as a shift or device to evade the usury laws of Alabama, and in order to change the title to the accounts into a status not apparently available to the creditors of the assignor, so as to hinder, delay or defraud them, the assignor executed assignments of the accounts absolute in form, so as to purport on their face to be an absolute and unconditional sale to the assignee, when in truth and in fact the assignments were

given as mere security for usurious loans amounting to 85% of the face amount of the accounts assigned.

(d) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are:

(i) Alabama Assignment of Accounts Receivable Act, Act No. 338, 1949 Acts of Alabama, p. 503, Title 39, Section 207, et seq, Code of Alabama, 1940.

(ii) Alabama laws relating to foreign corporations, Section 232, Article 12, Constitution of Alabama, 1901, Section 192, Title 10, Code of Alabama, 1940, Section 340, Title 51, Code of Alabama, 1940, and Section 345, Title 51 Code of Alabama, 1940.

(iii) Alabama Statutes on Fraudulent Conveyances, Section 1, Title 20, Code of Alabama, 1940, Section 7, Title 20, Code of Alabama, 1940.

(iv) The Alabama Statutes relating to Usury, same being Section 60 and 65, Title 9, Code of Alabama, 1940.

(v) Alabama Factor's Lien, Section 132 (2), Title 47, Code of Alabama, 1940.

(vi) Section 60(a), 11 U.S.C. §96 and Section 70 (c) and (e), 11 U.S.C. §110, of the Bankruptcy Act, as amended.

The pertinent sections of these statutes are set forth as Appendix IV.

II

STATEMENT OF THE CASE

(a) The General Nature of the Action and Basis For Federal Jurisdiction in the Court of First Instance

The action in the Court of first instance was filed by the Trustee in Bankruptcy of Munro-Van Helms Company to recover from the Respondent the proceeds of certain alleged imperfect and fraudulent assignments of accounts receivable. The basis for Federal jurisdiction there is diversity of the citizenship of the parties and amount, and the provisions of Sections 60(a) and 70(c) and (e) of the Bankruptcy Act, as amended.

(b) The Bankrupt and Its Estate

Munro-Van Helms Company, an Alabama corporation, filed a petition for an arrangement under Chapter XII, Section 322 of the Bankruptcy Act, on July 30, 1953. The debtor was adjudicated a bankrupt on April 12, 1954 (R. p. 371). The total unsecured claims filed against the estate amounted to $348,315.06. The remaining claims constitute Federal and State taxes amounting to $97,173.96 (R. p. 401). The total amount on hand with which to pay all claims, after liquidating the entire estate is $91,436.26 (R. p. 402).

(c) Bankrupt's Transactions With Commercial Credit Company, Inc., of Maryland

On May 19, 1949, Commercial Credit Company, Inc. of Maryland, a wholly owned Maryland subsidiary corporation of the Respondent herein, not qualified to

do business in Alabama, entered into a written agreement (R. p. 38) with the Bankrupt, whereby the terms were set out to govern the subsequent "purchase" by that corporation from the Bankrupt of such accounts receivable as were acceptable to it. The contract was executed by the Bankrupt in Alabama, and was accepted by the assignee at its office in Baltimore, Maryland. Nothing was assigned or purchased under the terms of this agreement.

The contract contained, among others, the following provisions: The assignee of the accounts agreed to advance to the Bankrupt at the time of the purchase of the accounts an amount equal to 80% to 85% of the face value of the accounts assigned, and to pay the remainder upon the payment thereof by the account debtors, unless the assignor "be in default in the performance of any provisions of this contract . . . " (R. p. 38); the Bankrupt agreed to pay the said purchasing corporation certain service charges amounting roughly from 10% to 14% per year (R. pp. 38, 44); the Bankrupt was permitted to collect the accounts and was required to deliver to the purchasing corporation in specie the original checks, drafts and other evidence of payment made by the account debtors (R. p. 39); the Bankrupt unqualifiedly undertook to pay every account in full and to repurchase, upon demand, all outstanding and unpaid accounts. Upon failure so to do, the purchasing corporation was given the right to sell the accounts and apply proceeds to the repurchase price, and recover deficiency from and pay surplus to the Bankrupt (R. p. 39).

From time to time thereafter, and up to December 31, 1952, Commercial Credit Company, Inc. of Mary-

land, advanced to the Bankrupt various sums of money upon the separate written assignment of its accounts receivable. On December 31, 1952, this corporation became liquidated into the parent, the Respondent herein, whereby the Respondent acquired all the assets and assumed all the liabilities of its subsidiary.

(d) The Basic Allegations of Claim 15 (R. pp. 235, 277)

Petitioner's Claim 15 is based upon these transactions of the Bankrupt with the Respondent's subsidiary, Commercial Credit Company, Inc. of Maryland. It sought to set aside certain of the assignments and recover the proceeds thereof received by the assignee, upon the following basic allegations:

That this corporation collected in specie the original checks, drafts, and other evidences and forms of payment made by the account debtors; that there existed between the Bankrupt and this corporation the relation of debtor and creditor; that, as a shift and device against the usury laws of Alabama, the assignments were absolute in form and purported to be unconditional purchases by and sales to the purchasing corporation of the accounts, whereas, in truth and in fact, they were intended as mere security for usurious loans; that the assignments were executed in Alabama pursuant to the Alabama Assignment of Accounts Receivable Act, but that the assignee did not comply with the filing provisions thereunder, by failing to file the statements required therein and by the defective filing thereof in various respects (not material to the review

sought here); that the form of the transactions by and between the parties was designed to change the title to the assigned accounts into a status not apparently available to the creditors of the Bankrupt, for the purpose of hindering, delaying and defrauding the creditors of the Bankrupt and are void as to creditors, being in violation of Sections 1 and 7, Title 20, Code of Alabama, 1940; and that, in addition to the hypothetical 70(c) creditors, there were actual creditors who filed claims in the Bankruptcy proceedings, some of whom were creditors prior to the assignment of some of the accounts in question, and others were creditors who intervened during the period between the assignment of the accounts and the collection thereof by the assignee.

(e) **The Theory of Claim 15**

Claim 15 was grounded on the provisions of Section 70(c) of the Bankruptcy Act, as amended, which give the Trustee the status of a creditor, actual or hypothetical, holding a lien by legal or equitable proceedings as to all the Bankrupt's property, whether or not in the Bankrupt's possession or control at the time of Bankruptcy, and Section 70(e), which requires the Trustee to avoid any transfer made by a bankrupt which, under any State law applicable thereto, is fraudulent or voidable for any other reason by any creditor of the bankrupt.

(f) **Bankrupt's Transactions with the Respondent, Commercial Credit Corporation**

Upon the liquidation of its said subsidiary, on December 31, 1952, the May 19, 1949, iffy agreement

executed between it and the Bankrupt was assigned by it to the Respondent corporation. (R. p. 108). The Respondent claimed that the Bankrupt accepted the assignment by letter, but this was never produced. (R. pp. 562-4). No such agreement was executed directly between the Bankrupt and the Respondent. The only written agreement between these parties relates to the actual execution of the assignments by the Bankrupt to the Respondent in the form of Exhibit "D", (R. p. 48) as follows:

> "Dated at Talladega, Ala., this 28th day of Feb., 1953, In consideration of One Dollar, receipt of which is hereby acknowledged, and other valuable considerations, the undersigned hereby sells, assigns and sets over to Commercial Credit Company, Inc., Baltimore, Maryland, herein called "Commercial Credit", its successors or assigns, all its right, title and interest in and to the accounts receivable and contracts above named, herein called "Accounts", with any securities or guarantees thereon, with right to Commercial Credit of stoppage in transit, aggregating Twenty-Two Thousand Two Hundred & Fifty and 98/100 Dollars ($22,250.98), gross, including all moneys due and to become due on same and title to the merchandise represented thereby in case same is not received, is returned, rejected, re-routed or reconsigned, and title to any new account contract or merchandise created through the resale or exchange of said merchandise, including any moneys owing thereon.
>
> In consideration of the prompt purchase and remittance by Commercial Credit for such of the above Accounts as are acceptable to Commercial Credit for such of the above Accounts as are acceptable to Commercial Credit without waiting to

make a complete credit investigation thereof, the undersigned hereby warrants that the undersigned and each debtor named in each Account is solvent and will remain so until maturity thereof; every Account and any note or other settlement received thereon will be paid in full in cash at the maturity thereof as set forth; the above assignment correctly sets forth undisputed Accounts now owing to the undersigned for bona fide sales and deliveries of merchandise as specified by the debtor (not shipments on consignment), or for work and labor done; there are no offsets, contra accounts or counter claims against any of them, and that proper entries have been made on its books disclosing the absolute sale thereof to Commercial Credit.

The undersigned will promptly forward to Commercial Credit all original remittances received by it from debtors upon the above Accounts. Undersigned represents and warrants that all collections received or credits allowed by it upon any and all accounts previously sold or assigned to Commercial Credit have been duly, properly and regularly credited to the accounts of the respective debtors on the books and records usually used for such purposes; all such collections have been promptly forwarded to Commercial Credit; none of said accounts have been sold or assigned to any other party; no other accounts owing to the undersigned have been sold or assigned to any other party, of which notice has been given to Commercial Credit, and that prompt report with amount thereof has been made to Commercial Credit of the rejection, return, re-routing, re-consignment or resale of any merchandise represented by any account previously sold or assigned to Commercial Credit.

The Accounts as hereinabove set forth are hereby purchased and paid for by Commercial Credit upon

the faith of each of the above warranties of the undersigned.

_____(Seal)

Munro-Van Helms Co.
(Signature of Customer)
/s/ C. F. Erickson Treas.

_____

(Signature of Officer, Partner or Owner) Title

Accepted by COMMERCIAL CREDIT

_____, 19____

By_____"

Pursuant to the course of dealings so theretofore established between the Bankrupt and the said subsidiary corporation, the Bankrupt begin to do business with the Respondent in January, 1953. During the seven months period thereafter, and up to the filing of the petition in bankruptcy on July 30, 1953, the Bankrupt from time to time, in consideration for contemporaneous advances amounting to eighty-five percent of the face amount of the accounts, executed the absolute assignment and sale to the Respondent in form above set out, of a large number of its accounts receivable, the proceeds of which were collected by the Respondent before the four months period prior to the filing of the petition in Bankruptcy, within the four months period prior to the filing of the petition, as well as subsequent to the filing of such petition. At no time prior to bankruptcy did the Respondent give notice of the assignments to the account debtors, and

all accounts were collected by the Bankrupt, and remitted in specie to the Respondent.

(i) **Controversy between Receiver and Respondent**

At the time the petition in bankruptcy was filed, there was due the Bankrupt, on outstanding and uncollected accounts so assigned, the sum of $124,951.60 (R. p. 526). After the filing of the petition, a controversy arose between the Receiver appointed in the Bankruptcy proceeding and the Respondent as to who was entitled to collect the outstanding accounts receivable. (R. pp. 375-6). Upon the hearing of a show cause order issued by the Referee to the Respondent, an arrangement was entered into by and between the Receiver and the Respondent, which was confirmed by an order of Court, whereby the Receiver was authorized to collect the accounts receivable, deposit the proceeds thereof in a special bank account to be held as a trust fund until the controversy between the parties as to who was entitled to the same was resolved (Tr. pp. 376-399).

Thereupon, the Receiver proceeded to collect the accounts receivable, and by April 22, 1954, had collected the total sum of $108,321.42 (R. p. 381). On April 22, the order of the Referee was reviewed by the District Judge, who entered an order holding that the Referee did not have summary jurisdiction over the accounts receivable, and requiring the Trustee to turn over to the Respondent the proceeds of the collections, as well as the assigned accounts remaining unpaid. (R. p. 93).

The order of the District Judge specifically provided, however, that "neither the rights of the Trustee nor

the Petitioner, Commercial Credit Corporation, are prejudiced by this order as to any matter that may be presented in any plenary action". In compliance with this order, the Trustee turned over to the Respondent the sum of $108,321.42, together with the remaining uncollected accounts. (R. p. 382). This plenary suit followed.

(ii) The Respondent and its business activities in the State of Alabama

The respondent is a Maryland corporation. Unlike its subsidiary heretofore referred to, it qualified to do business in the State of Alabama in 1945, and designated Montgomery, Alabama, as its principal place of business in the State of Alabama in the following documents filed by it in connection with its qualification to do business there:

Pursuant to the Constitution and Section 192, Title 10, Code of Alabama, the Appellee filed a certificate with the Secretary of State of Alabama, designating its statutory agent and known place of business. (R. p. 204).

Pursuant to the provisions of said Section 340, Title 51, the Appellee filed a statement, sworn to and verified by its President and Assistant Secretary, in which it designated its principal place of business in Alabama as "717-20 First National Bank Building, Montgomery, Montgomery County, Alabama". (R. p. 339).

Pursuant to the provisions of said Section 345, Title 51, the Appellee made application for a permit for the transaction of business in the State of

Alabama, for the years ending December 31, 1952, and December 31, 1953, in which it designated, under the oath of its officers, that its principal place of business in Alabama was "Montgomery". (R. pp. 340, 341).

Pursuant to the provisions of said Section 351, Title 51, the Appellee filed franchise tax returns for the years 1952 and 1953, duly verified under the oath of its officers, in which it designated its principal place of business in Alabama as "Montgomery". (R. pp. 342-345).

While the respondent did not have a place of business in the State of Alabama for the handling of accounts receivable financing, and while the assignments executed by the Bankrupt were forwarded to the Respondent's office at Baltimore, Maryland, where the same were accepted by the Respondent, and where the advances made by it were deposited to a bank account of the Bankrupt required to be opened there by the Respondent's subsidiary, pursuant to the scheme to avoid the usury laws of the State of Alabama, as alleged in Claim 15, above referred to, the Respondent, nevertheless, domesticated itself in Alabama and maintained there a number of places of business.

The District Court found that "defendant qualified to do business in the State of Alabama in January, 1945, and maintained local offices in several cities in the State of Alabama . . . ." The record shows that in 1952 and 1953, the Appellee maintained places of business in Alabama in the cities of Dothan, Montgomery, Mobile, Florence, Decatur, and Birmingham (R. p.

434). The Court below also found that "the local offices continued to handle exclusively wholesale or floor-planning of automobiles and appliances and individual consumer financing, as aforesaid". (R. p. 609).

The undisputed record shows that during the years 1952 and 1953, and for a long time prior thereto, the Appellee, in addition to the office of its statutory agent there, maintained a place of business in Montgomery, Alabama (R. p. 446), located at 219 Church Street (R. p. 460), where it engaged in the business of discounting automobile papers, appliance papers, and in the handling of personal loans (R. p. 461). The Montgomery office handles retail paper on conditional sales contracts, does floor planning under trust receipts (R. p. 461). The volume of business in the Montgomery office fluctuates from $300,000 to $800,000 per month (R. pp. 463-64), or roughly, $6,000,000 to $8,000,000 per year (R. p. 470). The Montgomery place of business employs more cash than any other office, with one exception, in the Atlanta Division (R. p. 470).

In addition to these activities, the Respondent localized many important phases of its accounts receivable financing business. Thus, during the year 1953, the Respondent employed a salesman who solicited customers in the State of Alabama for the financing of accounts receivable. (R. p. 564). It also employed auditors, who would come into Alabama from time to time to audit the accounts of its customers (R. p. 564). Presumably, this was part of the "service" it rendered the Bankrupt under the provisions of the May, 1949, agreement (R. p. 38). Under certain circumstances,

the Bankrupt was required to open its mail only in the presence of a representative of the Respondent (R. p. 38). Furthermore, the accounts receivable were executed in Alabama (R. p. 48), were expressly executed in accordance with the Alabama Assignment of Accounts Receivable Act, (R. p. 46), were payable in Alabama, and were collected by the Bankrupt in Alabama, as agent for the Respondent.

(iii) **Respondent failed to comply with the Filing Provisions of the Alabama Assignment of Accounts Receivable Act.**

This Act provides that assignments of accounts receivable shall be inoperative against creditors and purchasers, without notice, until a statement prescribed by the Act is filed for record, and provided further, however, that the assignments are in writing and the assignee has given value therefor. The statement to be filed for record was to contain "a designation of the assignor and assignee, and of the principal place of business of each within this State, if any; and a statement that the assignor has assigned, or intends to assign to assignee, one or more accounts receivable". (Section 209(1)).

On December 31, 1952, the Respondent filed a statement for record, making no reference whatever to its place of business in Alabama, giving, instead, its principal place of business in Maryland.

(iv) **The Basic allegations of Claim Sixteen**

Claim 16 is based upon these transactions of the Bankrupt with the Respondent. It sought to set aside

the assignments and recover the proceeds thereof received by the Respondent upon the following basic allegations:

That the assignments were absolute in form and purported to be unconditional purchases by and sales to the Respondment, whereas ,in truth and in fact, they were intended as mere security for, and a device against, usurious loans; that the form of the assignments was designed to change the title thereto into a status not apparently available to the creditors of the Bankrupt, and for the purpose of hindering, delaying to defrauding its creditors, in violation of the Alabama laws relating to fraudulent conveyances; that the assignments were expressly executed in accordance with the Alabama Assignment of Accounts Receivable Act, but that the Respondent did not comply with the filing provisions thereunder in the respects above set out; and that, in addition to the hypothetical creditors under Section 70(c) of the Bankruptcy Act, there were actual creditors who had filed claims in the bankruptcy proceedings, who were creditors prior to the assignment of some of the accounts in question, and others were creditors who intervened during the period between the assignment of some of the accounts and the collection thereof by the assignee.

(v) **The theories of Claim Sixteen**

Claim Sixteen was grounded (a) on the provisions of Section 60(a) of the aBnkruptcy Act, as amended, on the theory that the assignment of the accounts had not been perfected by recording, and that such assignments must be deemed to have been made immediately before the filing of the ptition in bankruptcy; (b) on the pro-

visions of Section 70(c) of the Bankruptcy Act, as amended, on the theory that the Trustee has the status of a creditor, actual or hypothetical, holding a lien by legal or equitable proceedings upon the accounts or the proceeds thereof received by the Respondent, whether or not in the Bankrupt's possession or control at the time of bankruptcy; and (c) upon Section 70 (e), which requires the Trustee to avoid any transfer made by the Bankrupt which, under any State law applicable thereto, is fraudulent or voidable for any other reason by any creditor of the Bankrupt.

(vi) The Undisputed Evidence and Admissions by Respondent

The undisputed evidence showed (a) that the assignments were absolute in form (R. pp. 36, 48); (b) that the assignments were, in truth and in fact, intended to operate as mere security for the payment of loans (R. pp. 573-579, 579-580, 200, 213, 516, 223, 525); (c) that the charges made were usurious under Alabama law, (R. pp. 38, 556-557; Appendix IV (iv)); (d) that pursuant to the statutes of Alabama relating to the qualification of foreign corporations to do business in the State, the Respondent designated Montgomery, Alabama, as its principal place of business in Alabama (R., pp. 192, 204, 339, 340, 341, 342-345); (e) that the Respondent maintained several places of business in Alabama, including one in Montgomery, Alabama, which employed more cash than any other office in its division (R., pp. 434, 446, 461, 463, 464, 470), and that (f) the Respondent localized in Alabama many important phases of its accounts receivable financing business (R. pp. 38, 46, 48, 564).

(g) Judgments of the Courts Below

(i) Judgments of the District Court

The District Court rendered summary judgment in favor of the Defendant as to the entire Claim 15 (R. pp. 606-7). With respect to Claim 16, the District Court rendered summary judgment in favor of the Defendant (a) as to that portion of the claim relating to the recovery of the proceeds of the accounts receivable collected by the assignee during the period of more than four months prior to the filing of the petition in bankruptcy; (b) as to that portion of the claim which is based upon the theory that a debtor and creditor relation existed by and between the Bankrupt and the Respondent, and that the assignments were executed as mere security for a debt, and (c) as to the invalidity of the assignments based upon the Alabama statutes prohibiting fraudulent conveyances, whether or not made or collected within the four months period prior to bankruptcy (R., pp. 606-7).

Upon the trial on the merits of the remaining portion of Claim 16, based upon the invalidity of the assignments for the failure to comply with the filing requirements of the Alabama Assignment of Accounts Receivable Act, the Court rendered judgment for the Defendant on the theory that the failure by Respondent to designate, in the statement filed under the Act, the principal place of business in Alabama, as set out in the corporate documents filed by it in Alabama, did not render the filing defective (R., p. 593).

(ii) Judgment of the Court of Appeals

The Court of Appeals affirmed the judgments of the

District Court as to Petitioner's Claim 16, and as to that part of Claim 15 which is based upon the Alabama laws relating to fraudulent conveyances, but reversed the judgment of the District Court as to that phase of Claim 15 which is based upon the alleged defective filing under the Alabama Assignment of Accounts Receivable Act.

III

ARGUMENT

I.

THE PURPOSE OF THE ALABAMA ASSIGNMENT OF ACCOUNTS RECEIVABLE ACT IS TWOFOLD: (1) TO FACILITATE THE PLEDGE AND SALE OF ACCOUNTS RECEIVABLE, AND (2) TO ELIMINATE FRAUD IN CONNECTION WITH SECRET ASSIGMENTS.

Acts of Alabama, 1949, Page 503.

Most of the states have passed statutes regulating assignment of accounts receivable, in order to avoid the impact of the decision of this Court in Corn Exchange National Bank and Trust Company v. Klander, 318 U. S. 434,63 S. Ct. 679. While all such statutes seek to facilitate accounts receivable financing, many of these are designed also to protect creditors and purchasers against secret, unrecorded assignments. The Alabama Act falls into the later category. It does, indeed, facilitate the pledge and sale of acounts receivable, but there can be no mistaking of the fact that it is also clearly designed "to eliminate fraud in connection with secret assignments". The assignments must be in writing and must be given for value. Every right

and privilege granted the assignee under the Act is conditioned upon the protection of creditors and purchasers, without notice, by requiring compliance with the filing provisions thereunder.

In this respect, the Alabama Act differs from those of other states, such as, for example, California, where the Act is designed solely fo rthe purpose of facilitating non-notification financing of accounts receivable by substituting the filing requirement of the Act for the former requirement that each customer-debtor be notified of the assignment. (Durkin v. Durkin, 133 Cal. Ap. (2d) 283, 284 Pac. (2d) 185; Costello v. Bank of America National Trust & Savings Association, 246 F. (2d) 807.) The purpose of the Alabama Act is similar to that of the Florida statute construed by the Circuit Court of Appeals (5th Circuit) in the case of M. M. Landy, Inc. v. Nicholas, 221 Fed (2d) 933, wherein it was held that the Florida statute was intended, in addition to facilitating accounts receivable financing, to protect creditors from secret, unrecorded assignments of accounts receivable, and to the Texas statute. (Second National Bank of Houston v. Phillips, 5th Circuit, 189 Fed. (2d) 115,) wherein the learned Court below held that its purpose is:

> "Its purpose is, by giving the name and address of the borrower as well as of the lender, to give notice to all persons dealing with it of the fact that the debtor has assigned, or intended to assign, accounts; and to afford persons dealing, or intending to deal, with the borrower, adequate opportunity to find out the facts as to his situation."

So it is here. The Alabama Legislature, by Section 209 of the Alabama Assignment of Accounts Receivable Act, has determined that the opportunity to find out

such facts was best afforded by requiring the lender to give its principal place of business in Alabama, if it has such place of business therein.

Accordingly, the question presents itself whether the Respondent had a principal place of business in Alabama, and if so, can it escape the consequences of the failure to designate it in the statement filed by it pursuant to the Alabama statute.

2.

WHERE A FOREIGN CORPORATION HAD SPECIFIED AS ITS PRINCIPAL PLACE OF BUSINESS IN ALABAMA THE CITY OF MONTGOMERY, UNDER THE REQUIREMENTS OF THE CONSTITUTION AND STATUTES RELATING TO FOREIGN CORPORATIONS, AND WHERE SUCH CORPORATION HAS SEVERAL PLACES OF BUSINESS IN ALABAMA, INCLUDING MONTGOMERY, THE PRINCIPAL PLACE OF BUSINESS OF SUCH CORPORATION IN ALABAMA IS MONTGOMERY, WITHIN THE MEANING OF THE RECORDING LAWS OF THE STATE OF ALABAMA.

Cobb v Central of Georgia Ry. Co.,
93 So. 845, 208 Ala. 134;
Fairbanks Steam Shovel Co. v. Wills,
36 S. Ct. 466, 240 U. S. 642;
Barnes v. Lynn, 221 F. (2d) 955;
Sullivan v. Sullivan Timber Co.,
15 So. 901, 103 Ala. 605;
Ala. Clay Products Co. v. City of Birmingham,
148 So. 328, 226 Ala. 631.

(a) **There can be no uncertainty as to what is the**

Principal Place of Business of a Foreign Corporation doing business in a state.

The constitutional and statutory provisions of Alabama dealing with the qualification of foreign corporations to do business there (Appendix IV (ii)') show that it was the intention of the Legislature of Alabama that a foreign corporation must, as a prerequisite to doing business in this State, for the protection of the public and for the public record, designate its principal place of business in Alabama. The judicial decisions, both State and Federal, also are clear to the conclusion that there can be no uncertainty as to where the principal place of business of a domestic or foreign corporation is for record purposes.

The learned Court below, in determining whether or not the Respondent had a principal place of business in Alabama, was influenced by such questions as which place of business of the Respondent in Alabama was "the most prominent" or "the most principal", and whether the several places of business of the Respondent in Alabama were independent of each other. It construed the Alabama Statute in the light of "business practicalities", or the usefulness of the giving of the principal place of business in Alabama as a source of information to creditors. We humbly submit that this is untenable, and is contrary to the clearly established rules adopted both by the Supreme Court of Alabama and by the Supreme Court of the United States, in the cases of Cobb v. Central of Georgia Railway Company and Fairbanks Steam Shovel Co. v. Wills, and other cases cited above.

In the Cobb case, every contention made by the Re-

spondent in the Court below was advocated there, weighed by the Supreme Court of Alabama, and was found wanting. The facts are almost identical. In this case, a foreign railroad corporation specified in the various corporate documents required to be filed under the various statutes for the qualification of foreign corporations to do business in Alabama, that its principal place of business in Alabama was in the City of Montgomery, just as was done here. A statute dealing with the recording of railroad rolling stock provided that it must be recorded in the Probate Office of the county in which the vende has its principal office or place of business, if any, in Alabama. The railroad contended, as did the Respondent here, that although it had several places of business in Alabama, it had no principal place of business in the State, and that its principal place of business was in Savannah, Georgia.

The Alabama Court held, first, that the place of record of the conditional sale is dependent upon the determination of wherther or not the railroad had in this State a principal place of business, saying:

> "* * * Due record of such contract of conditional sale was made only when filed for record in the proper office as warranted by the facts of the case, dependent on whether the vendor or lessor 'has not, in this state, a principal office or place of business', at or within the time provided for record of such written contract — * * *."

The Alabama Court then referred to the various state statutes (Appendix IV (ii)) by which a foreign corporation is required to state specifically its principal place of business in Alabama, and concluded:

"For the purpose of fixing the place of record of

such contract of conditional sale under the facts disclosed by this pleading and proof, appellee's 'principal office or place of business' under Section 3393 of the Code, is that principal 'place of business' designated by it under the provisions of Section 3648 of the Code, as being Montgomery, Alabama. * * *"

In the case of Fairbanks Steam Shovel Company v. Wills, supra, decided by this Court, there was involved an action by a Trustee in Bankruptcy challenging the validity of a mortgage on the ground that the same was not filed in the county where the principal office of the corporate mortgagor was located. The Bankrupt was an Illinois corporation. At the time the corporation was organized, it was required to file with the Secretary of State of Illinois a statement setting forth, among others, the location of the principal office of the corporation. Pursuant to these statutes, the Bankrupt stated that the location of its principal office was Chicago, Illinois, where no records were kept and no business conducted. The mortgage was recorded in the county where the principal office of the Bankrupt was actually located, rather than in Chicago. This Court held that the statutes of Illinois recognized the propriety of a fixed location of the principal office of the corporation, and held that the principal place of business of the corporation was Chicago, as designated in the corporate instruments filed by it, and that the mortgage, not having been recorded there, was invalid as against the Trustee in Bankruptcy.

In the case of Barnes v. Lynn, supra, the Court held that the place where the greater part of the corporate business of the corporation is conducted is not the proper test in determining where its principal office or

principal place of business, is saying that such a test "would be a confusing, if not unworkable, test * * *"

The Alabama Supreme Court has consistently held that both domestic and foreign corporations must have a fixed domicile in the State designated in the corporate documents, so as to give "the place of contact with persons having occasion to find the responsible management * * *." (Alabama Clay Products Co. v. City of Birmingham, 148 So. 328, 326 Ala. 631; Sullivan v. Sullivan Timber Co., 5 So. 901, 103 Ala. 605.)

(b) **The Courts Have Not Considered Business Practicalities in Construing Constructive Notice Statutes.**

It is to be noted that what we are dealing with here is constructive notice, a mere fiction, (39 Am. Jur. S. 7, 1958 Supp.), which was defined by this Court in Townsend v. Little, 27 L. Ed. 1012, 109 U. S. 504, as being, in its nature, "no more than evidence of notice, the presumption of which is so violent that the Court will not even allow of its being controverted." On the contrary, this Honorable Court invalidated the mortgage involved in the Fairbanks case for the failure to have the same recorded in the county where the Bankrupt maintained a mere fictional office, despite the fact that "so far as the practical conduct of the business was concerned, and to all outward appearances, the principal office was in Beardstown."

That the Cobb and Fairbanks cases can not be simply brushed aside on the theory that they dealt solely with the place of recordation, is made crystal clear when we consider the provisions of the Alabama Factor's

Lien Statute, the forerunner to the Alabama Assignment of Accounts Receivable Act. (See Appendix IV (v)). For here we have a statute which requires the notice to designate the principal place of business of the factor in Alabama, and that it be recorded in the county where such principal place of business is located. The decision of the Court of Appeals would lead to the absurd result that the notice would be required to be filed in one place, whereas the principal place of business designated therein would be in another.

Finally, the learned Court below refuses to adopt the rationale of these decisions here for the primary reason that "we do not think that in the light of the purposes of th[illegible] R. A., any such artificial result should be compelled." It is respectfully submitted that once it is determined that the respondent had a principal place of business in Alabama, it was mandatory upon the Respondent to furnish the same, as required by the Alabama Act, regardless of the artificial result which such notice would have produced. After all, whether the result is artificial is a matter which is properly addressable only to the Alabama Legislature.

3.

WHERE THE ALABAMA ASSIGNMENT OF ACCOUNTS RECEIVABLE ACT PROVIDES THAT ASSIGNMENTS EXECUTED THEREUNDER SHALL BE INOPERATIVE AGAINST THE CREDITORS OF THE ASSIGNOR, WITHOUT NOTICE, UNLESS A STATEMENT IS FILED THEREUNDER, GIVING, AMONG OTHERS, THE NAME OF THE ASSIGNEE AND ITS PRINCIPAL PLACE OF BUSINESS IN ALABAMA, IF ANY, SUCH RE-

QUIREMENT IS MANDATORY: AND THE FAILURE BY THE ASSIGNEE, HAVING SUCH A PLACE OF BUSINESS, TO DESIGNATE IT IN THE STATEMENT FILED RENDERS SUCH FILING INOPERATIVE AGAINST THE TRUSTEE IN BANKRUPTCY OF THE ASSIGNOR.

United States of America v. The Suring State Bank, 150 Fed. Supp. 60;
In Re: National Mills, Inc., 133 F. (2d) 604;
Howe v. Simison, 81 So. 837; 17 Ala. App. 59;
Butts v. Valerie Construction Co., et al, 259 N. Y. Supp. 93;
Edmund J. Rappoli Co., Inc., 169 N. Y. Supp. (2d) 376;
In Re: Brownsville Brewing Co. v. Meyer Mfg. Co., 117 Fed. (2d) 463;
General Motors Acceptance Corp. v. Haley, 109 N. E. (2d) 143.

Having established that the Appellee has a principal place of business in Alabama, it next needs to be determined what is the effect of its failure to designate it in the statement filed pursuant to the Alabama Assignment of Accounts Receivable Act.

The case of United States of America v. The Suring State Bank, supra, answers the question here. In this case, a Wisconsin statute provided that a chattel mortgage should give the mortgagee's name and post office address. The chattel mortgage was executed to the United States, acting through the administration of the Farms Home Administration. The mortgage did not give the mortgagee's post office address. The mortgage was duly recorded. The Court held that the requirement of the Wisconsin Statute that no chattel

mortgage shall be filed without the post office address of the mortgagee, is mandatory and not advisory or discretionary, and that the statute must be strictly construed, and that under such a strict construction the failure to give the mortgagee's address rendered the mortgage ineffective as against third parties, saying:

> "It is elementary that where there is a statute creating a fiction, like constructive notice, it should be strictly construed. This idea is certainly enforced by the considerations that recording was never essential to validate a chattel mortgage at common law, and that bona fide purchasers for value are favored and protected as a policy of the law. Absent recording laws, a bona fide purchaser of legal title is protected against a prior equity.
>
> One last relevant quotation from Am. Jur. is found at Chattel Mortgages, Section 116:
>
> 'A recorded mortgage which does not contain the name of the mortgagee is void as to a purchaser from the mortgagor.'
>
> The Court believes that lack of the address of the mortgagee is analogous to lack of his name and especially so where it is required by statute."

In the case of In re: Brownsville Brewing Company, supra, the Circuit Court of Appeals for the Third Circuit, in referring to a pennsylvania Recording Act, said:

> "Appellant here is contending for a liberal con- Acts. The argument is, we think, inappropriate. struction of one of the Pennsylvania Recording. That type of statute is for protection, not for punishment. Its interpretation should be strong to help its beneficiaries and not, as in the criminal

law, tempered with mercy toward those it strikes down. This is particularly so in a state whose 'abhorrence of the secret lien' did not even admit of the palliative of recording."

The Court held that the failure of a conditional sales contract to identify clearly the location of real estate by street and number, as required by statute, rendered it ineffective. The mere fact that third parties could have easily ascertained the exact location of the property by making inquiry was no answer.

The Court reasoned that a strict construction of the Recording Statute was desirable, concluding:

"The Pennsylvania Courts and our own District Court decisions exhibit a similar tendency. We say that insistence on a strict, definite and detailed requirement has this desirable effect. Conditional vendors and their advisers know what they must do, can easily do it, and when they have done it are not subject to the conceptions of any particular court."

This reasoning is forcefully applicable here. The insistence upon a literal compliance with the simple requirements of the Alabama Act, and the giving of the principal place of business as designated in the corporate documents on file in the State, would have the desirable effect of maintaining the universally adopted construction of the term "Principal Place of Business," and would remove the undesirable prospect of having the issue litigated in each case and determined by a court upon such uncertain factors as were considered by the learned Court below.

As was said by the Court in the case of In re: Na-

tional Mills, Inc., supra, in referring to an Illinois Recording Statute:

> "The commanding words thus employed leave little, if any, room for doubt, as to their mandatory character. We cite, without stopping to analyze, a few of the Illinois authorities which have distinguished between mandatory and directory professions of a statute. From these cases, we think it may be safely stated that a provision in a statute designed for the protection of the public or third parties is usually construed as mandatory."

23 R. C. L. 171, § 24, provides:

> "The doctrine of constructive notice, under the recording acts, has always been regarded as a harsh necessity, and the statutes which create it have always been subjected to the most rigid construction."

In the case of Howe v. Simison, supra, the Alabama Court adherred to the same view, holding that the owner of a mortgage, to be protected against a purchaser for value, must show compliance in all respects with Recording Statutes.

The New York Mechanic Lien Statute provides that a foreign corporation, in filing its notice of lien, must state "its principal place of business within this State." In the case of Butts v. Valerie Construction Co., supra, a foreign corporation filed a notice of lien in which it failed to give its principal place of business within the State of New York.

While the Court held that the maintenance of a mere sales office under the circumstances there set out did not constitute doing business within the State of New York, the Court said:

> ". . . yet, if this office is a principal place of business of the corporation within New York State, the omission may not be disregarded, and the provision that the statute 'shall be construed liberally does not authorize the courts entirely to dispense with what the statute says the notice shall contain'."

Thus, the New York Court is clear to the conclusion that even under a lien statute which requires that it be construed liberally, the failure by a foreign corporation, who has a principal place of business in New York, to designate that principal place of business in its notice of lien was fatal to the lien.

(a) The Alabama Assignment of Accounts Receivable Act is Patterned After Uniform Trust Receipt Act and is to Receive the Same Strict Construction Accorded the Latter Act.

The Alabama Assignment of Accounts Receivable Act, like the Accounts Receivable Acts of most states, follows the model of the Uniform Trust Receipts Acts (See Koessler on Accounts Receivable, Vol. 44, p. 590, Mich. Law Review). Accordingly, the language of the Trust Receipt Acts and the decisions construing them throw light on the subject under consideration. The State and Federal Courts have had accasion to construe the Uniform Trust Receipt Acts, giving them a strict construction, and have refused to liberalize the Acts by judicial decision as against creditors without notice.

In the case of In re: Yost, 107 Fed. Supp. 432, the Court, in referring to the Uniform Trust Receipts Act, said:

> ". . . . In view of the very meticulous provisions of the Act itself, and the liberality of its provisions in favor of the entruster, it was the view of the Referee, in which I concur, that there should not be further liberalization of the Act by judicial decision as against creditors without notice. The Act makes very simple requirements of the entruster to protect his interest. It seems only reasonable to require him to carefully comply with the provisions of the Act."

In the case of General Motors Acceptance Corporation v. Haley, supra, a trust receipt was held invalid because the letters "Inc." were left off the name of the Trustee. The Court held that in order to achieve constructive notice there must be exact compliance with the statute, and that any relaxation in strict interpretation would lead to confusion and lack of uniformity, saying:

> "What mainly concerns us, however, is the constructive notice sought to be imposed upon everyone as a consequence of the mere fact of filing and irrespective of investigation. In order to achieve constructive effect it seems only right that there be exact compliance with the statute. After all, there is no hardship for an entruster to see that the statutory requirements are met and the documents accurately executed. See In re: Brownsville Brewing Co., 3 Cir., 1117 F. 2d 463, 466."

What the Respondent seeks to do here is to justify the sufficiency of the filing contrary to Statute in the light of how fruitful an investigation thereunder would have been. It is clear that the doctrine of constructive notice is not and cannot be based upon such speculation and conjecture.

4.

AN ASSIGNMENT BY A DEBTOR TO A CREDITOR OF ACCOUNTS RECEIVABLE PURPORTING TO VEST THE ASOLUTE TITLE THERETO IN THE CREDITOR BUT WHICH WAS INTENDED BY THE PARTIES TO OPERATE MERELY AS SECURITY FOR A DEBT, IS WHOLLY VOID AS TO CREDITORS OF THE ASSIGNOR, REGARDLESS OF THE INTENT OF THE PARTIES.

Sections 1 and 7, Title 20, Code of Alabama, 1940;
Lewis v. Bank of Mobile, 87 So. 176; 204 Ala. 689.
Pace et al v. Wainwright, 10 So. (2d) 755;
243 Ala. 501.
Morton Hdwe. Co. v. Barranco, 172 So. 109;
233 Ala. 346.
Roden v. Norton, 29 So. 637, 128 Ala. 129;
O'Neal et al v. Birmingham Brewing Co.,
13 Co. 576, 101 Ala. 383;
Ruse et al v. Bromberg, 7 So. 384, 88 Ala. 619.
Campbell v. Davis, 4 So. 140, 85 Ala. 56;
Bryant v. Young, 21 Ala. 264
(absolute assignment of a bond for title to realty)
Steiner v. Scholze, et al,
21 So. 428; 114 Ala. 88
(absolute assignment of judgment)
Sims v. Gains, 64 Ala. 392
(Absolute assignment of certificate of purchase of bonds).
Truitt v. Crook, 30 So. 618, 129 Ala. 142
(Transfer of policy of insurance).

The Court below has reached the conclusion that the District Court was in error in holding that the assignments were sales rather than security devices, but concludes that Section 1, Title 20, of the Alabama Code, which condemns, as constructively fraudulent, an abso-

lute assignment intended merely as security, has been supplanted by the Alabama Assignment of Accounts Receivable Act.

We respectfully submit that the learned Court below has attributed to the Legislature of Alabama, in adopting the Accounts Receivable Act, an intent to overthrow fundamental principles and to depart from a general system of law relating to fraudulent conveyances not warranted by anything expressed in the Act, and not warranted by the history leading to this legislation in the State of Alabama, or in the nation as a whole.

True, the Act was designed to facilitate such type of financing in Alabama. There is nothing in the Act or history of such legislation in Alabama, or anywhere else, however, to show that this was to be done at all cost to the public policy and settled law of the state on fraudulent conveyances. The rules of statutory construction as adopted both by the Supreme Court of the United States and the Supreme Court of the State of Alabama compel a contrary conclusion. The statute itself, with an irrestible clearness, leaves no room for doubt in this respect. Its purpose is "to provide an exclusive method whereby the assignees of accounts receivable may perfect title thereto against creditors," but nevertheless, "this Act shall not be construed as superseding or repealing any other laws effective in Alabama relating to the subject matter covered by this Act."

To this, the Circuit Court of Appeals is about to add that so long as the method is followed, all rules of fair play may be abandoned. This means that from

now on, the rules of the market place may govern the transactions between an assignor and an assignee of accounts receivable. So long as the method outlined by the Act is followed, assignees may take absolute conveyances of accounts receivable from embarrassed or insolvent debtors, though intended merely to operate as security for a debt with impunity. Creditors hereafter will be at the mercy of their debtors and their assigns in any attempt to ferret out secret reservations of a benefit—the equity of redemption—referred to in the case of Campbell v. Davis, supra, and, even if such secret reservation be brought to light, under this decision of the Court, it can be of no avail to any creditor. For, if the principle rendering the transaction fraudulent and void against creditors of an assignor because of the reservation of a secret benefit—the equity of redemption—is no longer applicable to the assignment of accounts receivable, a creditor would have no remedy.

It is inconceivable that a statute, one of the purposes of which is to eliminate fraud in connection with secret assignments, intended to legalize fraud in the secret reservation of a benefit thereunder. (Colkins v. Lichtig 251 F. 844; Andrew L. Robinson v. Thomas M. Elliot 22 L Ed. 738, 22 Wall. 513-27).

(a) Absolute Conveyance Intended Merely as Security is Void Against Existing or Subsequent Creditors, Under Section 1, Title 20, Code of Ala., 1940.

The Statute declares void against existing and subsequent creditors, assignments made in trust for the use of the grantor. A long line of Alabama decisions

has held that this Statute applies to absolute conveyances intended merely as security. In the case of Truitt v. Crook, supra, involving an absolute conveyance of an insurance policy intended merely as security, the Court said:

> "The transfer of the policy of insurance assailed as fraudulent is absolute in form. The contention that it is void is based solely upon the proposition that it was intended as a security for a debt, which it is admitted was due by the transferror to the transferee. If the evidence establishes this contention, it cannot be a matter of serious controversy that the transfer was invalid as against the plaintiff, who was a creditor of the transferror at the time it was made. The principle upon which such a transfer is held void as against creditors is that there is a reservation of a benefit to the transferror—a trust for his use. Code, Sec. 2150." (Now Sec. 1, Title 20, Code of Ala., 1940).

Over one hundred years ago, the Supreme Court of Alabama, in the case of Bryant v. Young, 21 Ala. 264, described the fraudulent nature of an absolute sale given merely as security, in the following words:

> "By this arrangement, Young, who is shown to be insolvent, is enabled to place his property as a kind of deposit in the hands of Hall, secured against his other creditors by an absolute sale, but, as between him and Hall, to operate merely for Hall's indemnity, after which Young is to make the most of it.
>
> The law will not tolerate such a transaction; for if it did, an insolvent debtor could easily arrange with a favored creditor to become the absolute owner of his effects, thus securing them, by the absolute nature of the transfer or conveyance, from liability to his other debts, while at the same

time, he could avail himself of the effects as secured in trust; could speculate upon his equity of redemption, or pocket the residuum should a sale take place or use the transfers as a cover for future advances. It requires neither argument nor illustration to show with what ease such transfers could be converted to the worst of purposes.

There is no hardship in requiring those who seek to gain a preference over other creditors of an insolvent debtor, to make the written evidence of the contract substantially conform to the truth. The propriety of such a course is obvious to every ingenuous mind. By doing so, the other less fortunate creditors of the insolvent party will not be deluded by false appearances, the registration laws will not be defeated in securing the object which led to their enactment, and the unfortunate debtor himself will be cut off rrom temptation to fraud and circumvention in creating secret trusts for his benefit'."

(b) **The Written Agreements Do Not Conform To The Truth**

The Alabama Act requires that the assignments be in writing. Neither the assignments nor the extraneous agreement of May, 1949 speak the truth. There is no mention in the assignment of any equity of redemption to the 15% of the assigned accounts, nor is the right of creditors to the 15% of the accounts under the May, 1949 sales agreement the same as they would be in the case of a security device. Note, particularly, that under certain circumstances "no payments need be made by Commercial Credit" of the 15% assigned, even though the amount borrowed may ultimately be paid in full, and that there is no obligation on the part of the Respondent to collect the 15% assigned. Thus, creditors must stand by helpless until collection

is made by Respondent, whereas, under a security device they may intercept the 45 of the accounts as soon as the debt is paid.

Section 1, Title 20, Code of Alabama condemns any benefit reserved which is inconsistent with an absolute sale, whether expressed or not, and whether the grantor is solvent or not. **(Morton Hardware Co. v. Barranco,** 172 So. 109, 233 Ala. 346). A "purpose" to place property beyond the reach of creditors is not essential nor does the reservation need to be secret. **(Sandlin v. Robbins,** 62 Ala. 477). Extraneous agreements reserving an interest inconsistent with the provisions of an absolute sale have been consistently condemned by Alabama and other courts. (Annotation 68 A.L.R. 306, Pace v. Wainwright, supra). Nor is it necessary that there be an agreement to reconvey, since the law gives such right to every debtor upon payment of the debt, and the very absence of such agreement operates as a secret reservation of a benefit. **(Campbell v. Davis,** 4 So. 140, 85 Ala. 56).

The decision of the Circuit Court of Appeals is capable of far-reaching and serious consequences. Since under the Act, value is defined as any consideration sufficient to support a simple contract, this would mean that an assignor could, with impunity, assign a million dollars of accounts receivable for a nominal cash consideration, and upon the further consideration that the assignee support the assignor and his family for the balance of their lives. Such constructive fraud has been consistently condemned in Alabama. **(Armstrong v. Miller,** 189 So. 74, 238 Ala. 17; Sandlin v. Robbins, 62 Ala. 477), and would now be legalized by this decision.

Accounts receivable financing cannot be and is not that important to the citizens of the State of Alabama as to warrant such a drastic departure from the established policy and doctrines of the State relating to the rights of creditors. Certainly, a Federal Court should be hesitant to cause such upheaval in the laws of a state, in the absence of an expression in that regard "with irresistible clearness" from its legislature. **(Duncan v. Rudulph,** 16 So. (2d) 313, 245 Ala. 175).

5.

THE ASSAILED ASSIGNMENTS ARE VOID UNDER SECTION 7, TITLE 20, CODE OF ALABAMA

(a) The Case of Adkins v. Bynum; 109 Ala. 281, 19 So. 400

As to that part of the Petitioner's claim in which it is alleged that the assignments were executed with intent to hinder, delay or defraud creditors, the learned Court below has concluded that the District Court was right in holding that there was no genuine issue as to any material fact. This, for the reason that while there is here a creditor to be defrauded and a conveyance of property out of which the creditor could have realized his claim, there was no evidence of "a debtor intending to defraud", on the authority of **Adkins v. Bynum, supra.**

We respectfully submit to this Honorable Court that the Court below misconstrued the **Adkins** case. It is true that the case involved the mortgage of a stock of

goods, but the stock of goods did not belong to the debtor. These goods belonged to the mortgagee who sold them to the debtor upon condition that the debtor simultaneously mortgage the same back to secure the payment of the purchase money. Obviously, the debtor there conveyed nothing which any creditor could have subjected to the payment of his debt, and, therefore, the mortgage could not have been fraudulent as to creditors. The full meaining of the Alabama Court's decision is stated thusly:

> "Here is a debtor who has nothing in the world. He wants to go into business, it may or may not be, with a purpose to make money and pay his debts. He induces a third party to sell hi ma stock of goods on time, upon condition that he simultaneously mortgage the property back to secure the payment of the purchase money. Now, the only change in the debtor's attitude towards his creditors, worked by this transaction, is that, whereas before he had nothing, he no whas an equity of redemption in the stock of goods, which may be subjected by his creditors, and that while before he was, it may be doing nothing, he is now, it may be, in the wa yof making something for his creditors. was actuated by a purpose on his part to hinder, delay, and defraud them, is absurd."

The **Adkins** case was held in applicable in the subsequent case of **Gillespie v. McCleskey,** 49 So. 362, 160 Ala. 289, where there was involved a mortgage on a stock of merchandise for the purchase money, but where the mortgage debt was for an amount less than the total purchase price.

Again, in the case of **Mitchell v. Conway, et al,** 60 So. (2d) 676, 257 Ala. 648, the Alabama Supreme Court

further clarified the decision in the **Adkins** case as follows:

> "In Adkins v. Bynum, supra, which is aleged to have been the first case on the subject, the vital facts are stated to be that although the mortgagor was authorized to retain possession for sale and disposition on his own account, the mortgage given by him was to secure the payment of the purchase price of property presently sold to him and covering that property only, the sale and mortgage being contemporaneous and constituting one transaction. The mortgage was for the entire purchase price. An element of the right of creditors to subject such property in priority to the mortgage was declared to be a conveyance of property out of which the creditor could have realized his claim or some portion of it.
>
> "We believe that it would not be contended that the exception discussed in Adkins v. Bynum, supra, would apply if in the transaction the mortgagor bought various items of merchandise, each for a separate price and paid the purchase price of some but not the purchase price of other items, and gave a mortgage on all items to secure the price of those not paid for."

Now, how can the exception in the **Adkins** case apply here at all? We do not have here a sale of property from Respondent to the Bankrupt and a mortgage back to secure the purchase price. The accounts assigned belonged to the Bankrupt and not the Respondent. When these accounts were transferred and assigned to Respondent, they constituted assets which could have been subjected by creditors to the payment of their debts. For every dollar of accounts receivable assigned there was loaned the Bankrupt an amount equal to 85% thereof. If such an assignment is incap-

able of being made with a purpose to hinder, delay or defraud creditors, there can be no such thing as a fraudulent conveyance.

The learned court below was clearly in error in affirming the summary judgment of the District Court in favor of the Respondent on the claim based upon a charge of actual fraud.

CONCLUSION

Despite the complexity of the pleadings in this case, the questions sought to be reviewed here stand out with the greatest of clarity. Put in the simplest terms, they are:

(1) Whether the requirement of the Alabama Assignment of Accounts Receivable Act, that the assignee designate its principal place of business in Alabama in the notice to be filed under the Act may be disregarded by judicial liberalization of its terms; and

(2) Whether compliance with the Alabama Assignment of Account Receivable Act renders the assignments executed pursuant thereto immune from any attack on the ground of constructive fraud; and

(3) Whether assignments given to secure an advance equal to 85% thereof are incapable, as a matter of law, of being made with intent to hinder, delay or defraud creditors of the assignor.

These questions decided by the learned Court below are not limited to an interpretation of Alabama law, but are of the greatest importance to the trade and

commerce of the entire United States. All similar acts adopted throughout the United States are affected by this decision.

There is another special and important reason in this case which, in our humble opinion, calls for the exercise of the judicial discretion by this Honorable Court in favor of granting a review on writ of certiorari. It is that the decision of the learned Court below imposes a standard of conduct upon the citizens of Alabama, which is violently opposed to the long standing public policy and fundamental principles of the State on fraudulent conveyances. It departs from a general system of law, in the absence of an expression in that regard either from the Legislature or the Courts of the State.

Finally, the decision of the Court of Appeals is clearly not only in conflict with the applicable State law, but also with the decisions of other Courts of Appeals and of this Honorable Court.

Accordingly, this petition for a writ of certiorari is due to be granted.

Respectfully submitted,

Morris K. Sirote
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PROOF OF SERVICE OF PETITION

I, Morris K. Sirote, an attorney in the office of Messrs. Sirote, Permutt, Friend & Friedman, Attorney of Record for the Petitioner herein, deposes and says: That on the day of July, 1959, I served a copy of the within Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Commercial Credit Corporation, the Respondent herein, by delivering the same to the Hon. Kenneth Perrine, in the offices of Messrs. Leader,

Tenenbaum, Perrine & Swedlaw, Counsel of Record for the said Commercial Credit Corporation, located at 933 Frank Nelson Building, Birmingham 3, Alabama.

Morris K. Sirote

Sworn to and subscribed before me,
at Birmingham, Alabama, this the

day of July, 1959.

Notary Public, Jefferson County,
Alabama

My Commission Expires: —

APPENDIX

I

OPIONION OF THE COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17243

FRANK S. BLACKFORD,
as Trustee in Bankruptcy of
MUNRO-VAN HELMS COMPANY
Appellant,

versus

COMMERCIAL CREDIT CORPORATION
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(January 23, 1959.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: This is a bankruptcy case involving the validity of an assignment of accounts receivable by the Bankrupt, Munro-Van Helms Company to CCC, the appellee, Commercial Credit Corporation.[1]

[1] The Trustee, Blackford, contests the validity and seeks to recover the amounts collected on the accounts for the benefit of creditors. CCC asserts the priority of the transfer an dtheir right to its fruits.

After filing enough pleadings to consume 360 pages of the printed record, the trial's tone was set by a ten-page opening introductory colloquy of confusion in which all participants demonstrated with the candor born of impromptu their general lack of comprehension and agreement as to just what issues were about to be tried. And, days later, the trial ended with the last pages of testimony intertwined with the continued and concluding dispute between counsel as to just what the trial had been about. Not a little of the confusion is traceable to the complex prolixity of the pleadings in which a basic claim might be set forth as many as three or four times depending on the number of legal theories contrived or asserted. "Waivers" or "withdrawals" of many of these was apparently an effort—almost nowhere successful—to eradicate the lawyer-made complexity and restore to the pleadings their rightful office under the Civil Rules to simplify, not confuse, the issues. Small wonder that Judge Grooms had to follow his carefully constructed initial opinion and judgment with an amending order based on his ruling on CCC's motion for summary judgment, in which he acknowledged that issues he had understood to have been waived by the Trustee were in fact left in the case. Thus has it become our task to sift through 616 pages of record and 175 pages of briefs and supplemental briefs, to alternately save and discard, and formulate the issues before us.

I

Background.

But before such an undertaking it is helpful to start "in the beginning." The transactions between Bankrupt and CCC had their inception in a contract made in May 1949. This contract was the basis for the future dealings between the two parties in which CCC would purchase, and Bankrupt would sell, Bankrupt's accounts receivable. Of course, "assignment of accounts receivable," or "non-notification financing" is an accepted commercial practice and is recognized and now provided for by statute in many states. The specific details of the contract will be dealt with more fully later. In general, it provided that CCC would purchase acceptable accounts receivable from Bankrupt from time to time advancing 85% of the purchase price immediately and the remaining 15% upon payment in full by the account debtor. Bankrupt was to be billed for a monthly service charge figured on a percentage of the "average daily outstanding face of accounts during such month." Bankrupt was authorized to collect on the accounts and in fact did so; warranted the payment in full by account debtors of all accounts; agreed to repurchase from CCC all delinquent accounts; and assumed liability for attorney's fees, court costs and other expenses owed under the contract provisions. The contract stated that it should be governed by the laws of Maryland.

This whole case turns largely on the fact that Section 209 of the Alabama Assignment of Accounts Receivable Act of 1949, Ala. Code, Tit. 39, §§207-214 (1940), (referred to as ARA) requires filing of a notice

of such assignments. Presumably pursuant to such Act the parties filed a "Statement of Assignment of Accounts Receivable" or renewal thereof in October of 1949, 1950, 1951, 1952 and December of 1952 with the Office of Probate Judge in Talladega County, Alabama (the residence of Bankrupt). There followed a continuous course of business dealings between Bankrupt and CCC until the filing of a Chapter XI petition in bankruptcy by Bankrupt on July 30, 1953. Adjudication of bankruptcy followed on April 12, 1954.[2]

Upon the filing of the petition in bankruptcy the Receiver in Bankruptcy took possession of the uncollected accounts receivable then in the possession of CCC, over its objection, by virtue of an order of the Referee. This order was subsequently reversed by Judge Lynne on April 22, 1954, upon a finding that the Referee was without summary jurisdiction,[3] and the remaining uncollected accounts were thereupon turned over to CCC

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[2] Two relatively insignificant details must be noted for accuracy. (1) The contract was originally between Bankrupt and Commercial Credit Company, Inc., of Maryland. On December 31, 1952, pursuant to a plan of liquidation, Commercial Credit Company, Inc., of Maryland was merged into Commercial Credit Corporation. It thereby assumed all its predecessor's rights and liabilities, Bankrupt agreed to continue doing business with Commercial Credit Corporation, and did so. We consider this to be of no significance. The two are indiscriminately referred to throughout this opinion as "CCC," and may be distinguished, if need be, by reference to the December 31, 1952 date. (2) The contract specified 80%-20% terms, but was subsequently amended (3/6/52) to 85%-15% and is so treated throughout this opinion.

[3] Except that it determined that the trustee must resort to a plenary suit, not summary proceedings, this action has no significance as res judicata, prior unappealed from determination, or otherwise. Cf. Nicholas v. Cohn, 5 Cir., 1958, 255 F.2d 301, 304.

along with the funds already collected by the Receiver on the other accounts.

II

Issues.

With this story behind us we attempt to ascertain the questions which were presented and those still in issue in this case. Stripped of all the voluminous charge and countercharge, amendment and reply, the Trustee advanced essentially these claims.

[III] Accounts assigned prior to bankruptcy but collected subsequent to it were invalid because

(A) the recorded notice of assignment was defective under ARA, or

(B) even though sufficient, the assignments were in fraud of creditors under Alabama law.

[IV] Accounts assigned prior to bankruptcy and collected prior to bankruptcy were invalid because of

(A) a failure to comply with ARA, or

(B) even though compiled with, assignments were in fraud of creditors under Alabama law.

[V] Accounts assigned within four months, one year, of bankruptcy were voidable

preferences unde rsection 60(a) or invalid under section 67(d)(2).

[VI] Several claims involving miscellaneous issues such as

(A) usury,

(B) post-bankruptcy assignments,

(C) assignment of additional security,

(D) collections subsequent to adjudication,

(E) attorney's fees and expenses.

III

Pre-Bankruptcy Assignments—Post-Bankruptcy Collections.

(A) Defective ARA Notice

This claim which was listed above as [III] is the most serious both in content and amount. This relates to assignment of accounts receivable made to CCC during April through July 1953. Collections of the accounts from account debtors were all made after bankruptcy.

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[4] Assignments were made from May 12, 1949 (the date of the contract between CCC and Bankrupt) until the filing of the petition in bankruptcy. The assignments involved under this claim, however, are limited to those during April through July of 1953. Many figures are referred to in this context. They are briefly tabulated for ready reference below.

Explanation	Amount
Face amount of accounts assigned April-July 1953	$125,125.57
Collected by Receiver 8/10/53-4/22/54; returned to CCC by Court order 4/22/54, see note 3, supra.	$108,321.42

The principal attack disregards any assertion of knowledge of insolvency or of fraud, either actual or constructive, under Alabama law. The attack is the frontal one that the assignments were defective under ARA because the recorded notice specified the assignee's (CCC's) place of business as "Baltimore, Maryland" rather than Montgomery, Alabama, the place designated in certain other statutory filings. Voidable thus under the State law, the transfer was ineffective against the Trustee. Bankruptcy Act § 70(e), 11 USAC § 110.

Except in this one detail there is no dispute about the statutory adequacy of the assignment or notice. The notices were otherwise in the proper form filed at the right time, and in the office provided by statute.

It is not necessary to go beyond the language of the Act itself to sustain Judge Grooms' opinion and judgment on this point that CCC complied with ARA.

Cash balance due CCC from Bankrupt under contract, as August 10, 1953	$100,939.49	
Charges and collection expenses due CCC from Bankrupt under contract on $125,125.57	14,675.50	
under contract on $125,125.57. Total due CCC from Bankrupt as of August 10, 1953		$115,614.99
Total held by CCC 6/17/55 of the $125,125.57 including the $108,321 turned over 4/22/54		$109,897.97

If the Trustee succeeds in this claim he would recover the $109,897.97, above, plus the remaining uncollected accounts. Conversely, if CCC prevails it will be entitled to the $115,614.99, above.

The ARA[5] provided that "a statement" shall be filed "containing (a) a designation of the assignor and

[5] Section 209 of the Act, which comprises section 207 through 214, provides:

"§ 209. Filing statement of assignment, renewal statement, notice of cancellation or affidavit of continuance.—(1) Any person undertaking or having undertaken the acceptance of or contemplating the acceptance of assignment of accounts receivable is entitled to file, in the office of the judge of probate of the county as hereinafter provided, a statement, signed by the assignor and assignee of such accounts receivable, containing (a) a designation of the assignor and assignee, and of the principal place of business of each, within this state, if any; and (b) a statement that the assignor has assigned, or intends to assign to assignee one or more accounts receivable.

"The following form of statement (or any other form of statement containing substantially the same information) shall suffice for the purposes of this chapter, viz.:

" 'Statement of Assignment of Accounts Receivable'

" 'Date

" '_____ has assigned or intends to assign one or more accounts receivable to _____ in accordance with the Alabama Assignment of Accounts Receivable Act.

" 'The assignor is _____ (an individual, a corporation, a partnership) The principal place of business of assignor in the State of Alabama is at _____ (Street Address) _____ (City) _____ (County)

" 'The assignee is _____ (an individual, a corporation, a partnership) The principal place of business of assignee is at _____ (Street Address) _____ (City) _____ (County)

_____ (Assignor) _____ (Assignee)

"Such statement shall be filed in the office of the judge of probate for the county in which assignor's principal place of business within this state is located.

* * *

"(3) Presentation for filing of the statement prescribed in subsections 1 and 2 of this section, and payment of the filing fee, shall constitute filing under this chapter,

assignee, and of the principal place of business of each, within this state, if any; * * *." Section 209 continues, "The following form of a statement (or any other form of statement containing substantially the same information) shall suffice for the purpose of this Act, viz.: * * *." A model form then follows, including, "The principal place of business of assignor in the State of Alabama is at ," and, "The principal place of business of assignee is at ."

(Street Address) (City) (County)

(Street Address) (City) (County)

The statement then "shall be filed in the office of the judge of probate for the county in which the assignor's principal place of business within this state is located."

The two words "if any" following "place of business * * * within this state" certainly indicate that the Act did not consider a "principal place of business" within Alabama as a prerequisite to the protection it affords. This interpretation is strengthened by other provisions as well, as, for example, the comma after "each" ("the principal place of business of each, within this state, if any," rather than, "the principal place of business of each within this state, if any"). The "any other form * * * containing substantially the same information" liberality is consistent. And the statutorily approved forms themselves demonstrate a double standard by the provisions that "the principal place of business of assignor **in the State of Alabama** is" while that for the

in favor of the assignee, as to all accounts receivable assigned by assignor to assignee in accordance with the provisions of section 208, and which shall be assigned within one year after the date of such filing, which period of one year shall be the effective period of such statement as sometimes referrd to in this chapter. * * *."

assignee is simply "the principal place of business of assignee is" with no reference to location in **Alabama.** (emphasis supplied)

The Trutee's contention that the notice should have specified Montgomery, Alabama, does not rest on the fact that CCC's office there was engaged in accounts receivable financing or that, in contrast to the many other of its offices located in Alabama, Montgomery was the **most** principal. He could not have succeeded had he made the attempt. For the facts clearly justified the District Court's conclusions to the contrary. CCC had an office in Montgomery which, like many others throughout the state, was engaged in various forms of consumer and floor plan financing for household appliances, automobiles, and the like. But these offices were completely independent of each other, operating under the supervision of the Atlanta division office, and Montgomery was not the most prominent. And none of them, and certainly not Montgomery, had anything to do with accounts receivable financing, all of which was conducted directly by the home office in Baltimore.

It is rather the Trustee's contention that the term "principal place of business" in ARA was intended to refer to the comparable term in other statutes concerning the filing of corporate papers. This was expanded somewhat to a contention that if the legislature did not intend specifically to make the terms synonymous, any actual designations of a statutory "principal place of business" would be conclusive. Underlying this argument was the admitted fact that pursuant to Ala. Code Tit. 1, Secs. 340 and 345 (1940), in its application for permit to do business as a foreign corpora-

tion, and under Tit. 51, Sec. 351, in its franchise tax return, CCC indicated as its "principal place of business in Alabama" simply "Montgomery," and as the name of their authorized agent, Fred and Richard Ball, Attorneys, 717-720 First National Bank Building, Montgomery, Alabama.

We do not think that in the light of the purposes of the ARA any such artificial result should be compelled. The ARA reflects in its preamble that it was enacted "all in order to promote trade and commerce by facilitating the sale and pledge of accounts receivable and to eliminate fraud in connection with secret assignments." The protection of creditors against fraudulent assignments was, of course, important. But in its historical setting what precipitated this, and similar legislation across the nation, were the judicial decisions which were thought unduly to restrict and encumber this much needed and legitimate form of business financing.[6]

We would close our eyes to reality if we were to conclude that Alabama, enacting a statute designed to surmount these barriers, intended that it was to be interpreted in a way to raise new, and perhaps even more difficult, hurdles.[7]

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[6] Such operations have been fully dealt with in two fine articles by Maximillan Koesler, Assignment of Accounts Receivable, 33 Calif. L. Rev. 40 (1945), and New Legislation Affecting Non-Notification Financing of Accounts Receivable, 44 Mich. L. Rev. 563 (1946). See also, Ribaudo v. Citizens Nat'l Bank, 5 Cir., 1958, ... F.2d .... [No. 17204, Nov. 26, 1958]; Costello v. Bank of America Nat'l Trust & Savings Assn., 9 Cir., 1957, 246 F.2d 807; M. M. Landy, Inc. v. Nicholas, 5 Cir., 1955, 221 F.2d 923.

[7] The case of Cobb v. Central of Georgia Ry. Co., 1922, 208 Ala. 121, 93 So. 815, so heavily relied upon by Trustee does not require a contrary result. That case did not in-

Approaching it, as Alabama requires, in the light of common sense and business practicalities, there was substantial compliance. The naming of the statutory agent, or the designation of his office as the address would not have afforded to any creditor, actual, potential, or theoretical, any more information than that reflected by the recorded notice. Inquiry in either case would have ended in Baltimore, Maryland. That was the place indicated.

The District Judge was right and we affirm his conclusion on this phase.

(B) Assignments Invalid As in Fraud of Creditors.

The Trustee also seeks to recover the $125,125.57 in assigned accounts (and the $109,897.97 thereof already

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volve the validity of the recorded mortgage or whether it charged persons with constructive notice. That case dealt solely with the place of recordation of railroad rolling stock, i.e., who was to get the recording fee. It concluded that the Railroad could not assert its principal place of business was in Savannah, Georgia, when in fact it had Alabama places of businesses and had indicated one of them as its principal place of business for purposes of permission to do business as a foreign corporation. In our case there is no question of compliance with the **place** of recordation requirement. Section 209 provides, "Such statement shall be filed in the office of the judge of probate for the county in which **assignor's principal place of business within this state** is located." This was fully complied with. By the same token, Fairbanks Steam Shovel Co. v. Wills, 1916, 240 U.S. 642, 36 S.Ct. 466, 60 L.Ed. 841, and similar cases relied upon by Trustee, dealt with the place for recordation for statutory purposes rather than a mere incidental indication of "place of business." Nor are others, similarly pressed, controlling; e.g., United States v. The Suring State Bank, D.C.E.D. Wisc., 1957, 150 F.Supp. 60; People ex rel Knickerbocker Press v. Barker, 1895, 94 N.Y. Sup.Ct. 341, aff'd 147 N.Y. 715, 42 N.E. 725; Edmund J. Rappoli Co., 1957, 5 N.Y.A.D.2d 758, 169 N.Y.Supp.2d 376.

collected) in claims based upon theories of fraudulent transfers.

These claims take a double thrust, and were decided adverse to Trustee on summary judgment. It is contended that the contract was but a cover up for a secret trust by which terms Bankrupt could reclaim the accounts (and certainly the 15%) purportedly irrevocably conveyed to CCC. It is further contended that the very fact that what was made to appear a sale was in law but a security device for a loan made this a transfer in fraud of creditors.

Such contentions are, of course, bottomed on Section 70(e) of the Bankruptcy Act, 11 USCA §110, and the necessary State law, in this instance Sections 1 and 7 of the Alabama Code, Title 20.[8]

This question is one which Judge Grooms felt had been waived by the Trustee during the trial, subsequently found had not been, and resulted in his amending his judgment and issuing an "Order formally rul-

[8] "§1. Conveyances of personal property in trust for the grantor are void as to creditors.—All deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, are void against creditors, existing or subsequent, of such person."

"§7. All instruments made to hinder, delay, or defraud persons, void as to them.—All conveyances, or assignments in writing, or otherwise, of any estate or interest in real or personal property, and every charge upon the same made with intent to hinder, delay, or defraud creditors, purchasers, or other persons of their lawful suits, damages, forfeitures, debts, or demands; and every bond, or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, against the persons who are or may be so hindered, delayed, or defrauded, their heirs, personal representatives and assigns, are void." Ala. Code 1940 Tit. 20, §§1, 7.

ing on Defendant's Motion for Summary Judgment," in which he ruled out any possibility of recovery on the theory that CCC "had reserved a lien by way of security."

This claim is of a serious and substantial nature and requires essentially a two-step analysis. Was the transaction between Bankrupt and CCC, as spelled out in the contract, in the nature of a loan rather than a sale? If so, how does this affect the outcome. It is only after these questions have been answered that consideration may be given to the questions of whether this was a conveyance in trust for Bankrupt or in fraud of creditors, and the extent to which the ARA changes the law in this regard.

Relationship Between the Parties

Of course, "it is not only the right but the duty of the court to probe behind the written contracts, and to examine all facts and circumstances which shed any light upon the true nature of the transaction." **General Motors Acceptance Corp. v. Mid-West Chevrolet Co.**, 10 Cir., 1933, 66 F.2d 1, 4. Thus does it become our duty to examine the contract in more detail to ascertain the true nature of the relationship it created.

The contract begins, "[CCC] will, from time to time, **purchase** from Customer [Bankrupt] such accounts * * * as are acceptable to [CCC] and will advance to [Bankrupt] at the time of **purchase** eighty-five Percent (85%) of the net face value of Accounts, * * *." (emphasis supplied). So far this is certainly language of a sale.

However, the following provisions would suggest that this was a security device. "At the end of each month [CCC] will bill [Bankrupt] for charges in connection with the purchase of Accounts during such month and for the services and considerations specified herein." Such charges were to be calculated "upon the amount of the average daily outstanding face of Accounts during such month: * * *." These rates varied from 1/31 of 1% per day on less than $25,000, to 1/42 of 1% per day on accounts over $200,000. Such calculations bear a close resemblance to common interest rates—equivalent to 8% to 12% a year. This is coupled with a provision that "[Bankrupt] warrants, guarantees and agrees [that] each Account will be paid in full on or before the date shown as its due date on the assignment thereof, and if not so paid, [Bankrupt] shall upon demand promptly pay any amounts represented to be owing thereon to [CCC]. * * *." There are, moreover, provisions that Bankrupt will make good to CCC any account prior to its due date if the account debtor is in uncertain financial circumstances. Bankrupt will pay CCC for any credits they must make to account debtors, and other similar provisions essentially guaranteeing CCC that they will suffer no loss on the transaction. There is a special provision that Bankrupt will pay CCC "all attorneys' fees, court costs, and all other expenses" which they may incur in collecting the amounts due them from either account debtors or Bankrupt. Finally, there is the provision that "[CCC] authorized and permits [Bankrupt] to collect Accounts from debtors."

Upon close analysis this is essentially the same as though a loan, as such, was made and the accounts re-

ceivable assigned as security therefor. Except for terminology used this result was as though CCC had loaned Bankrupt over $100,000 from April through July of 1953 and Bankrupt had agreed to repay this amount. As security for the loan Bankrupt would have assigned to CCC its interest in about $125,000 worth of accounts receivables. The scheme envisioned that payments would be made from Bankrupt to CCC from the proceeds of the accounts receivable as they were collected. The interest rate would fluctuate from 8% to 12% on the unpaid balance of the loan, but would be figured, for purposes of the contract, on the basis of "outstanding face of Accounts." If Bankrupt were to cease payment of the loan, it then became immediately due ("then [Bankrupt] will, on demand, repurchase from [CCC] all of the outstanding and unpaid Accounts"). And in the event CCC had to sue Bankrupt to collect the balance of the loan, they would have also been entitled to the traditional attorneys' fees and expenses.

This is in no way a unique conclusion on our part. The Supreme Court, confronted with a similar contract, adopted the conclusion of the District Court that "insofar as the contracts in question here use words fit for a contract of purchase, they are mere shams and devices to cover loans of money at usurious rates of interest." **Home Bond Co. v. McChesney,** 1916, 239 U.S. 568, 575, 36 Sup. Ct. 170, 173, 60 L.Ed. 444, 448. In a similar case the Second Circuit concluded, "in decisions construing usury stateutes, contracts of this kind have uniformly been held to be collateral loans. We see no reason to give them any other interpretation here." (citing many cases) In re **Gotham Can Co.**

v. **Rafferty**, 2 Cir., 1931, 48 F.2d 540, 541. The Third Circuit reached a similar conclusion in **Brierley v. Commercial Credit Co.**, 3 Cir., 1930, 43 F.2d 730. And so did we. **Commercial Security Co. v Holcombe**, 5 Cir., 1920, 262 Fed. 657, 661-62.

But our conclusion that this was a loan with security rather than a sale really solves nothing. The fact remains that there was an assignment of accounts receivable which, under our holding, in all ways complied with, and was protected by, the ARA. Thus, if the cart is to be upset, it must be by virtue of the impact of other Alabama statutes upon this loan transaction.

Alleged Secret Trust.

But before discussing the merits of the Trustee's assertions in terms of Title 20, Section 1 and 7, it is necessary to briefly examine the extent to which these statutes may have been tempered in the area of accounts receivable by the ARA. It is true that Section 213 of the ARA provides, "this chapter shall not be construed as superseding or repealing any other laws effective in Alabama relative to the subject matter covered by this chapter * * *." But an equally significant provision a few lines later cannot thereby be rendered a nullity: "the purpose of this statute is to provide an **exclusive method** whereby the assignees of accounts receivable **may perfect title thereto against creditors** * * *." (Emphasis supplies). Section 207 has defined "assignment" as "any transfer, sale, pledge or mortgage of an account * * *." Therefore, while we expressly do not hold that the ARA makes actual fraud permissible in these transactions, what is otherwise provided for by the ARA cannot be rendered of no

effect by treating such transactions as some form of constructive fraud on the basis of these prior statutes and their judicial interpretations.

What is the meaning of Title 20, Section 1? This was found to have been violated, for example, in **Pace v. Wainwright,** 1942, 243 Ala. 492, 10 So.2d 755 where the grantor of land under a deed absolute retained a secret trust that the grantee would reconvey the property to her on demand, and that she could move onto the property and make it her home. See also **Armstrong v. Miller,** 1939, 238 Ala. 17, 189 So. 74. We do not believe this is such a case. There was no evidence of any agreement, nor indeed of any reason for one, whereby Bankrupt could repurchase from CCC the assigned accounts receivable on demand. The only analogous provisions in the contract were the ones that "[Bankrupt] shall upon demand promptly pay any amounts represented to be owing [on delinquent accounts] to [CCC]" and "if any act amounting to a business failure by or against [Bankrupt] should be committed, then [Bankrupt] will, on demand, repurchase from [CCC] all of the outstanding and unpaid Accounts * * *." The demand here is, of course, that of CCC not Bankrupt, and is designed as additional protection for CCC not as a secret trust for Bankrupt.

Alleged Fraudulent Transfers.

However, the Trustee has asserted another claim based on Section 7 of the same title, note 8, **supra,** which provides in pertinent part "assignments [of] personal property * * * made with the intent to hinder, delay, or defraud creditors * * * are void."

Of course, it is true that a fraudulent conveyance may take many forms. Thus, a mortgage, **Drain v. F. S. Royster Guano Co.**, 1936, 231 Ala. 422, 165 So. 239, a collusive suit, **Weingarten v. Marcus**, 1899, 121 Ala. 187, 25 So. 852, or a collusive writ of attachment, **Gassenheimer v. Kellogg**, 1899, 121 Ala. 109, 26 So. 29, have all been held to be vehicles for the violation of this statute. Surely it would also be possible to use an assignment of accounts receivables in this way. But there must be more than creditors and a conveyance. As the Alabama Supreme Court has declared in the leading case of **Adkins v. Bynum**, 1896, 109 Ala. 281, 19 So. 400:

> "In reviewing these rulings, it becames necessary to decide a question which has not heretofore been adjudicated by this or any other court, so far as our investigation has disclosed. * * * It is laid down in the books, as a general proposition, that the concurrence of three elements is essential in the constitution of a fraudulent conveyance; that is to say, before a conveyance can be declared fraudulent it must be made to appear that there is (1) a creditor to be defrauded; (2) a debtor intending to defraud; and (3) a conveyance of property out of which the creditor could have realized his claim, or some portion thereof. * * * In the case at bar there was a creditor to be, and who claims that he was, defrauded, and there was a debtor. So much is clear. But it is not clear that such debtor is shown, by what he did, to have intended to defraud the creditor, nor that what he did had the effect of hindering, delaying, or defrauding the creditor; * * *."

This case involved the mortgage of a stock of goods. Certainly such a transaction could be considered voidable as a fraudulent conveyance. Here, however, as the Court concludes,

> "Now, the only change in the debtor's attitude towards his creditors, worked by this transaction, is that * * * while before he was, it may be, doing nothing, he is now, it may be, in the way of making something for his creditors. To say that such change in the attitude of the debtor, to the obvious benefit of the creditors, was actuated by a purpose on his part to hinder, delay, and defraud them, is absurd." 109 Ala. . . . . , 19 So. 401-02.

So it is in our case. We have a "creditor to be defrauded." We have "a conveyance of property out of which the creditor could have realized his claim." But the District Court was right in concluding that there was no evidence of "a debtor intending to defraud." As to this issue there was "no genuine issue as to any material fact." FRCP 56(c), 28 USCA.

And it might be noted that if this was an attempt to hide a loan behind the language of a sale, none would be deceived. As the Trustee himself so ably points out, and as we have held, such language has been universally construed to have the effect of a security device. And this conclusion of its legal effect is based upon the terms of the contract revealed on its face, and not, as is usual, by extraneous facts showing it to be something other than what it says.

And, as discussed earlier, to the extent that such a transaction might have been found constructively fraudulent under these prior Alabama statutes and decisions merely because of the form of the transaction, in the absence of actual fraud the ARA has supplanted their effect. Applied in the light of the business purpose of this statute, there is nothing to indicate an intention that the "transfer, sale, pledge or mortgage" must be disjunctive. It may technically be one or more of such things. The important thing is that, as is so plainly the case here, if it is to serve as the means of acquiring needed financing Alabama validates the transaction provided the terms of ARA are satisfied.

The Trustee has further urged that this was fraudulent because Bankrupt has retained a 15% interest in the "purchase price" of the accounts since the contract binds CCC to pay this percentage when the full amount of the accounts was collected. We do not agree. We find no purpose here to put this amount beyond the reach of general creditors. It did not serve to give Bankrupt a secret interest. CCC was obligated under the contract to pay it to Bankrupt immediately upon its collection. Having done so this amount would, of course, pass out of any possible control or claim of CCC and inure to the benefit of general creditors of Bankrupt. Of course, until collected the creditors lost nothing. Upon collection they immediately obtained the same rights as though the contract purported only to transfer to CCC an 85% interest.

Thus, must we conclude that the Trustee fails as to claims based upon theories of fraudulent transactions between CCC and Bankrupt.

IV.

Pre-Bankruptcy Assignments—Pre-Bankruptcy Collections.

With great elaboration in his pleaded fifteenth claim[9] and perhaps in part in the sixteenth claim[10] the Trustee sought recovery for the amount of accounts receivable assigned during the several years prior to bankruptcy and in all cases callected from the account debtors by assignee more than four months prior to bankruptcy. The basis was essentially the twofold one set forth and discussed under III (A) and (B)—failure

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[9] The fifteenth claim covered accounts receivable assigned from May 19, 1949 to December 31, 1952, and claimed to have been in the neighborhood of $3,000,000. Noncompliance with ARA was alleged to have occurred from its effective date, October 8, 1949, down through October 5, 1951, for the failure to file any notice of assignment, and for the period October 5, 1951 to December 31, 1952, for failure to Commercial Credit Company, Inc., of Maryland (the assignee named in the filed notice) to obtain the written assignment required by ARA. For this claim a distinction between Commercial Credit Corporation and Commercial Credit Company, Inc. of Maryland is asserted to have special significance, see note 2, supra. The Trustee asserted that the assignments were ineffective against Trustee under Section 70 (c) and (e), and alternatively the defective assignments created in CCC only an equitable lien which pursuant to Section 60 was not deemed perfected until immediately preceding bankruptcy at which time CCC knew bankrupt was insolvent.

[10] The sixteenth claim covered assignments of accounts receivable made during the months of January through July 1953 of a face amount asserted to have been in the neighborhood of $500,000. The ARA noncompliance was the failure to specify Montgomery as the principal place of business, the ruling on which was, of course, correct for the reasons set forth in III (A), supra, without regard to whether the accounts were collected prior or subsequent to bankruptcy. The alternative Section 60 claim fell thereby as well. The assignments were alleged to have been in fraud of creditors under Section 1 and 7, Title 20, Code of Alabama 1940, for the reasons specified in III (B).

to comply with ARA and, as to the sixteenth claim, the attempted assignments were in fraud of creditors.

This was also an area in which the District Court, for reasons we now fully appreciate, became confused. In his initial opinion he assumed that these claims (and others) "had been relinquished." This was corrected by a subsequent order which reflected that in part, at least, these were the claims on which the Court had previously granted CCC's motion for summary judgment on the Trustee's "15th claim and on so much of the 16th claim and other claims that purport to encompass assigned claims which were paid in full more than four months prior to bankruptcy * * *."

(A) Invalid for Failure to Comply with ARA.

This differs in three principal respects from the problem dealt with in II (A). First, the accounts receivable were collected by CCC more than four months prior to bankruptcy and not after bankruptcy. Second, the noncompliance in the fifteenth claim with ARA was for reasons other than failure to specify properly assignee's principal place of business. And third, the Court's action was not after trial, but by summary judgment.

As to the second difference, CCC's brief candidly states that "There has been no trial on the merits as to whether or not there was compliance with the" ARA. No contention has yet been made that these alleged defects did not amount to noncompliance. Summary judgment was sought and granted on the sole ground that since the accounts involved were all collected by CCC long prior to bankruptcy (and at least more than four months), the Trustee could not recover.

The Court, without opinion, presumably based this action on **Costello v. Bank of America Nat'l Trust & Savings Assoc.**, 1957, 9 Cir., 246 F.2d 807. That Court, after first determining that the assignment of the state highway construction contract was not within the California Accounts Receivable Act, proceeded to state an alternative ground for its conclusion that the assignee, not the trustee, should prevail. In doing so, it affirmed the Trial Court—whose action was described as contrary to that of another California District Court whose decision, **Menick v. Carson,** 1951, D.C.S.D. Cal., 96 F.Supp. 817, is here so much pressed by Trustee.

In **Menick v. Carson,** the District Court, rejecting the extreme claims of the trustee that all creditors were protected as well as the extreme position of assignee, that no creditor was protected, set up a middle of the road formula. It held that as to creditors existing as of the date of assignment and as to those who became creditors between that time and the date the assignee collected the account, the assignment was not protected. Under Section 70(e) the trustee could assert their rights. However, as to creditors who became such after collection, there was nothing to set aside.

The 9th Circuit in the **Costello** case, however, rejected even this moderate view by language which is either dicta or decisive depending on one's point of view, at 246 F.2d 813.

> "There is nothing in the language of the statute or its legislative history which compels us to stretch the recording statute to encompass collected obligations as well as outstanding accounts. The statute is concerned expressly

> only with the assigned right or rights. It is silent in respect to the **proceeds** inuring under that right." (emphasis in original).

Persuasive as this is, we cannot at this stage say that as a matter of law no claim was made out for non-compliance with ARA simply because accounts were collected. There is, of course, no magic in the four months' period, for if the assignments were vulnerable under Section 70 the time is controlled by local law. As Collier has succinctly put it.

> "Section 70e(1) prescribes no conditions or time limits within which transactions are deemed voidable. It merely incorporates the applicable state or federal law in this regard. Consequently, the four months' or one year's limitations established in §§60 and 67 are inappliacble in a suit under §70e." 4 Collier, Bankruptcy §70.71 at 1355 (14th ed. 1956).

We must bear in mind that it is the Alabama law which we must here interpret and apply. Despite their common origin as a reflex against adverse judicial decision, many of these acts differ in their subsidiary significant details. **Ribaudo v. Citizens Nat'l Bank,** 5 Cir., 1958, . . . F.2d . . . [No. 17,204, November 26, 1958]. So here, the Alabama Act (ARA) is different from the California Statute. The 9th Circuit Court correctly pointed out that the California Act was "silent in respect to the proceeds." 246 F.2d at 813. But this is not so in ARA.

The ARA expressly refers to proceeds, so much so that the term is carefully defined.[11] And then the Act by both a negative[12] and an affirmative[13] statement

[11] "§207. Definitions.—For the purposes of this chapter the following words, unless the context or subject matter

sets forth standards. It provides that creditors or subsequent assignees have no claim against the assigned account or proceeds if ARA is compiled with. The converse, however, is equally plain, that if ARA is not complied with as to an assignment an "existing or future creditor" without notice of the assignment has the prior claim since the purported assignment "shall be inoperative."

The ARA reflects a purpose by Alabama to consider not only the assigned account but, under some circumstances, the proceeds as well. Just what those circumstances are or will be, we do not know. Nor do we

otherwise requires, shall have the following meanings:

* * *

". 'Proceeds in any form' of an account means any interest in, or benefit accruing from, the account, including: (a) A judgment arising from the account, (b) proceeds of any partial or complete payment of the account in money or otherwise, including any obligation taken as absolute or conditional payment of the account, (c) security subsequently taken for the account, and (d) goods the sale of which gave rise to the account, returned or not received by the account debtor."

[12] Section 208, after first stating that the assignment is valid and fully perfected without regard to actual notice to the account debtor if the assignment is in writing and notice is filed, then provides:

"No existing or future creditor of the assignor, and no subsequent assignee of an account receivable, can or shall, after the making of such an assignment in accordance with the foregoing provisions of this section, and during the effective period of any statement, renewal statement, or affidavit of continuance filed by the assignee as provided in section 209 of this chapter, acquire any right, title, lien or interest in or to such account, or any proceeds in any form thereof, equal or superior to or in diminution of the rights of the assignee under such assignment, except as hereinafter specified in the proviso to subsection 3 of section 209."

[13] The "proviso to subsection 3 of section 209" referred to, note 12, supra, after stating what acts shall constitute a proper filing, provides:

think that at this stage we should undertake to ferret out those possibilities or set them forth if ascertained. Much of it might well turn out to be of mere academic importance, for the trial on this issue may finally establish that there is no creditor whose rights the Trustee can successfully assert. As it now stands, the allegations of the complaint are sufficiently definite to set forth that there were as to all such assignments creditors in these possible classes: (1) existing at the time of the assignment, (2) subsequent to assignment but prior to collection, (3) subsequent to collection, and (4) those in categories (1), (2) or (3) who remain creditors as of the date of bankruptcy. Certainly as to one of these creditors, the assignment would be ineffective if ARA were violated.

We think on such a matter of serious importance to the business interests of Alabama, exposition of the law ought to be made in the light of the actual facts. Any other course would expose us to the likelihood that we would engage in pure dicta.

Not the least of the uncertainty arises from the nature of the noncompliance with ARA. If it was merely in the recording, i.e., sufficiency or manner of filing of the notice of assignment, the collection by the assignee might, under Alabama law, be significantly analogous to a mortgagee coming into possession (or foreclosing) of property under a mortgage or chattel

"Assignments of accounts made after the effective date of this chapter shall be inoperative against creditors and purchasers without notice until the statement prescribed in subsection 1 and 2 of this section (or renewal of notice or affidavit of continuance as provided by this chapter) shall be filed for record in accordance with the provisions of this chapter."

mortgage. See 4 Collier, Bankruptcy §§70.55 at 1288; 70. 56 at 1292, n. 18; 70.57 at 1297, n. 27; 70.64 at 1323, n. 22; 70.79 at 1406, n. 9; 70.81 at 1417, n. 23 (14th ed. 1956). It might be much different if, as the pleadings suggest, some of the assignments named as assignee a party other than CCC who advanced the funds.

Added to this is the uncertainty inherent in the application of Section 70 of the Bankruptcy Act. How far back, for example, does Alabama go in considering proceeds (collections of an assigned account) still to be property of the bankrupt under Section 70(a)(5)? What class of creditor can attack the transfer and is there any such actual creditor as of the date of bankruptcy as Section 70(e) requires? See 4 Collier, Bankruptcy, §70.81 at 1417-18 (14th ed. 1956). To what extent is the ideal theoretical lien-holding creditor of the now Sampsonstrong arm section 70(c) available as an aid to the Trustee?[11]

If this is unsatisfactory, it is of CCC's making. It is only that frustration which is so common from disposition of a claim or defense virtually on the basis of pleadings only when appeal proves the bold course to

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[11] Collier states that Section 70(c) may be of little help. 4 Collier, Bankruptcy §70.55 at 1286 (14th ed. 1956). We would not wish to predict our ruling now, but the widespread criticism of Constance v. Harvey, 2 Cir., 1954, 215 F.2d 571, and Conti v. Volper, 2 Cir., 1956, 229 F.2d 317, see 4 Collier, supra, Supplement, additions to pp. 1258, citing Marsh, Constance v. Harvey—The "Strong-Arm Clause" Re-Evaluated, 43 Calif. L. Rev. 65 (1955); 1270, n. 2; 1272; 1274, at least suggest that if Alabama law finally declares that collection cuts off all creditors except, say, (1) existing or (2) subsequent to assignment but prior to collection, we should be certain that reasonable reconstruction of Section 70(c) justifies a result which might otherwise be extremely artificial.

have been erroneous. As CCC urged, the District Court held that no matter how many creditors there still were, the collection of the assigned account by the assignee permanently dissolved all deficiencies. That sweeping position, we hold, is untenable. So, years later must now begin the exploration of the facts to determine whether any such persons exist either in fact or in permissible legal fiction.

(B) Assignments Invalid as in Fraud of Creditors.

The sixteenth claim, see note 10, **supra,** is stated in a way that it overlaps in part the months in the year 1953 involved in Claims III(A) and (B). We list it here separately merely to indicate that we have dealt with it.

For the reasons fully discussed under III(B), the action of the District Court was correct in granting summary judgment to CCC without regard to the time of collection, before or after bankruptcy.

V.

Voidable Preference Claims.

The Trustee has asserted as a further claim that the assignments during 1953 were voidable transfers under Sections 60 and 67(d)(2) of the Bankruptcy Act, 11 USCA §§96, 107, in that they were within the proscribed time and when the Bankrupt was known to be insolvent.

Normally these issues would still be in the case, as the Court below erroneously ruled that the transaction

was a sale rather than a loan. This ruling left nothing to try under Section 60, for in the Section 60 definition of a preference as "a transfer * * * for the benefit of a creditor for or on account of **an antecedent debt** * * *" (emphasis supplied), lies the exclusion of any claim if the prerequisite debt cannot be shown. See 4, Collier, Bankruptcy §60.19 at 823-24 (14th ed. 1956).

But the Trustee abandoned all claims based on his theory,[15] and there is no reason suggested to extricate him from this knowing act.[16]

VI.

Miscellaneous Claims.

The preceding Sections III-V have been an attempt to present in an organized way the primary claims of the Trustee. As is typical, such an approach leaves much that is "miscellaneous." The more significant of these remaining points are discussed here.

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[15] At the end of the trial, on the next to the last page of printed trial transcript, Mr. Sirote, for the Trustee, gave the following summary conclusion relevant to this point.

"Now, let's get this clear: The Court, as I understand it, ruled out certain phases of the claims. **The Court did leave in one phase of the thing; that is which related to the preference,** which related to collections made within the four months period. **That part of it is what we have abandoned.** The preference was a claim based upon the collection of accounts made within the four months period. Any other abandonment on our part is involuntary, and based upon the rulings of the Court. That's right, isn't it?" (emphasis supplied.)

[16] Of course, this does not apply to the special circumstances involved in the claim relative to additional security for antecedent debts, discussed VI(B), infra.

(A) Usury.

For example, the Trustee contends that the usury statutes would impose a limitation upon such a transaction. The Alabama law limits rates of interest to 8% on written contracts and 6% on all others. Ala. Code 1940, Tit. 9, §60. While we do not determine the amount involved under this claim, it should be noted that it would be relatively small. The Alabama law provides that the penalty for usurious contracts only involves the interest. This is so because only the principal is legally due, and if any interest has been paid it is deducted from the principal in determining the amount due lender. Ala. Code 1940, Tit. 9, Sec. 65. See note 4, **supra.**

Determinative here, however, is a question relating to a problem of conflicts of law. The parties agreed, and the contract provided, that "this Contract * * * shall be construed and governed by the laws of the State where it is accepted by [CCC]." This was, of course, in Baltimore, Maryland, where the contract was made. In fact CCC advanced money to Bankrupt only upon receipt in Baltimore of schedules of accounts receivables assigned to CCC, and upon receipt of these schedules deposited the advanced funds to Bankrupt's account in the Union Trust Company of Maryland, a Baltimore bank. The contract required Bankrupt to send all checks received from account debtors to CCC's Baltimore office and they did, in fact, do so. Whatever conclusions may be drawn as to the law controlling the contract generally, it cannot be disputed that for purposes of usury the transaction had substantial contact with Maryland.

The proposition is well established in conflicts of law that, as to questions of usurious interests on a loan transaction having contact with many states, the law upholding the contract is to be controlling. This is so because parties are presumed to intend their contracts to be legal. Under Maryland law "no corporation shall interpose the defense of usury in any action." Md. Code 1957, Art. 23, §125. Accordingly we hold, without passing on the controlling conflicts of law rules for other purposes, that as to the question of usury this contract had adequate contact with the State of Maryland to be upheld by its law. **Fahs v. Martin,** 5 Cir., 1955, 224 F.2d 387, 397; **Lubbock Hotel Co. v Guaranty Bank & Trust Co.,** 5 Cir., 1935, 77 Fd2d 1952, 1956; **Brierley v. Commercial Credit Co.,** 3 Cir., 1930, 43 F.2d 730, cert. denied, 282 U.S. 897, 51 Sup.Ct. 182, 75 L.Ed. 790. 2 Beale, Conflict of Laws 1241 (1935) (citing four columns of cases); Stumberg, Conflict of Laws, 237-40 (2d ed. 1951).

(B) Post-Bankruptcy Assignments.

The record shows without contradiction that after bankruptcy and on July 31, 1953, CCC came into possession of accounts receivable in the amount of $2,562.71. No advances of cash to Bankrupt were simultaneously made by CCC as was typically the case of assignments, such as those considered in Part I, **supra.** Consequently, the "transfer" was for an antecedent debt.

CCC undertakes to justify this by the contention that under the contract[17] it had the right to obtain and retain additional security. Of course, the Bankrupt

(then a debtor under its Chapter XI Petition) could not legally transfer accounts receivable or cash in such a fashion to afford CCC a preference over other creditors. The right of CCC to retain the benefit of these must then be tested as though CCC had moved for an order to compel the Trustee to surrender the items.

Any such effort would have been based on the claim that the contract obligated the Bankrupt to transfer additional security as might be needed from time to time. The contract certainly did not express this. It did obligate CCC to purchase acceptable accounts receivable as tendered by Bankrupt and bound Bankrupt to tender them first to CCC. But for such "purchases" CCC was to pay the 85% of the face amount.

There was no enforceable contract right to these accounts and the purported post-bankruptcy transfer was invalid[17] against the Trustee. §70(d)(5), 11 USCA §110.

(C) Accounts Assigned As Additional Security.

Somewhat related to the post-bankruptcy assignments, VI(B), **supra**, are accounts assigned as additional security to CCC on the eve of bankruptcy. In the latter part of July 1953 CCC held $7,829.74 in ac-

[17] "(1) Commercial Credit [CCC] may hold for purchase or as security any Account, property, securities, or moneys of Customer [Bankrupt], which may at any time be assigned to or delivered to or come into the possession of [CCC], and may apply the same or the proceeds thereof to the payment of any amounts which at any time then or thereafter are or might be owing to [CCC] by customer [Bankrupt] either under this contract or otherwise; * * *."

counts on which they had advanced $6,655.28 which were running 60 days past due. In such a situation it was CCC's practice, pursuant to the contract, to require the assignor to purchase such accounts. Apparently it was impossible for Bankrupt to do so, so they merely substituted for these delinquent accounts (totaling $7,829.74) two additional schedules totaling $5,978.94. This was accomplished by assignment on July 29, 1953 of $3,416.23 which was covered in Trustee's claim No. 2, and the assignment of July 31 of $2,562.71 covered in Trustee's claim No. 3 just discussed under Part VI(B). The Trustee's claim No. 2, so far as we can determine, was never waived and if it were it was only so insofar as it was included in the claib for $109,897.97. Consequently, it was and is in the case. CCC never made the 85% advance against these assignments of $3,416.23. Consequently, the "transfer" was for an antecedent debt.

Thus there was directly presented the serious question of whether this was a voidable preference. See 3 Collier, Bankruptcy §60.48 (14th ed. 1956). In the Trustee's complaint the second claim was based primarily on §67d(2)(a)(b)(c)(d) of the Bankruptcy Act, 11 USCA §107. But, as this claim was so unlike that respecting the accounts receivable aggregating $125,125.57, we thoink the complaint comprehended the theories based on Section 67d(2)(a) through (d) and, upon this evidence received without objection, an implied amendment asserting the theory of a Section 60(a)

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[5] This amount was specified as claim 3 which was "waived because it was included in the large claim for $109,897.97. It was and is still in the case and CCC must afford the Trustee the full benefit of it.

preference. In the confusion we think that the Court erroneously assumed that this claim was abandoned and presented nothing for decision. In that light our review is limited to the determination that the District Court has not yet decided the issue. It is premature for us to declare that had the Court rejected it, there was proper basis for that action.

(D) Accounts Collected Subsequent to Adjudication.

Trustee's claim No. 4 was for the payments received by CCC on May 26, 1954 and June 25, 1954 aggregating $586.18 on the account of Harris Pump Supply Company.

Trustee's claim No. 5 grows out of the indebtedness owed by Valley Plumbing & Heating Company to Bankrupt in the sum of $2,653.04. While the matter has the usual obscurity of this record, presumably the account debtor gave Bankrupt promissory notes in payment of this account. CCC collected $990.37 of this amount (presumably payments on the notes) subsequent to the adjudication of bankruptcy April 12, 1954. The balance of the notes, $1,652.67, has not yet been paid.

These claims were not formally passed on by the Court one way or another. We think they are in the case for if they were "waived," it was so only insofar as they were items included within the claim for $109,897.97.

While it is premature to express a view, we think it not inappropriate to make comments which will perhaps facilitate the orderly disposition of these two

small matters. The Trustee seems to labor under the conviction that since these collections were made by CCC subsequent to the adjudication in bankruptcy (April 12, 1954), they have some standing different from the collections made either by the receiver or by CCC in the interim between the filing of the petition July 30, 1953 and the date of adjudication. We regard that as immaterial. Presumably the assignments of the accounts receivable were effected prior to bankruptcy and the validity of the transfer as of that time determines the right of CCC to retain the collections whenever made. So far as we can determine the accounts represented by these two claims are no different than the other pre-bankruptcy assignments. If that is so, the same principles will apply as outlined in the detailed discussion concerning the large claim, see III, **supra.** If they are post-bankruptcy assignments, then they will be covered by the principles discussed in Part VI(B).

Claim 5 offers an additional complication. Apparently there are some promissory notes involved. Whether these took the place of the accounts receivable from the account debtor, whether they were meant as payment of that account, or whether they were merely security for the payment of it is not disclosed by this record. To the extent that the promissory notes were a payment of the accounts receivable, the rights of the parties will be determined by Alabama law other than that reflected in the ARA. Section 207 expressly "excludes sums due on rights represented by judgments, notes, bills of exchange, drafts, acceptances, or other negotiable or non-negotiable instruments or agreements for the payment of money * * *."

(E) Attorneys' Fees and Contract Charges.

The Trustee further complains of the allowance of attorneys' fees to CCC. The contract between Bankrupt and CCC provided for attorneys' fees.[19] We find that counsel for Trustee effectually agreed as to the reasonableness of the fee.[20]

The contract not only provided for an assessment of attorneys' fees, but for contract charges as well. See III(B), Relationship Between the Parties, **supra.** These charges we treat as vicarious interest so long as the balance of advances remains outstandnig. They are recoverable to the extent of the security. **Oppenheimer v. Oldham,** 5 Cir., 1949, 178 F.2d 386. That the $108,321.42 was temporarily in the custody of the Receiver

[19] "If [Bankrupt] fails to perform promptly or breaches any of the promises or obligations herein contained, then [CCC] shall be entitled to recover from [Bankrupt], and [Bankrupt] shall pay [CCC] all attorneys' fees, court costs, and all other expenses which may be expended or incurred by [CCC] to obtain or enforce payment of any Account, either against the [account] debtor, [Bankrupt] or any guarantors, or expended or incurred in the prosecution of any action against [Bankrupt] or any guarantors, or concerning any matter growing out of or connected with subject matter of this Contract and Accounts purchased hereunder; * * *."

[20] "Mr. Sirote [counsel for Trustee]: I don't question that they paid you the fee that is indicated there, if that is what you mean

"Mr. Perrine [counsel for CCC]: Do you question the reasonableness of the fee?

"Mr. Sirote: I am questioning whether we are chargable with it.

"Mr. Perrine: But there is no question about the reasonableness of the fee? It is not a question of whether you are chargeable but the reasonableness of the fee?

"The Court: Don't get off into something not material.

"Mr. Sirote: I am not questioning that either."

under an improvident order did not make CCC any less entitled ot its rightful enjoyment and control of its funds.

VII.

Judgment.

Thus have we reached the end, and the result that the case is affirmed in part and as to the other phases is reversed and remanded for further and not inconsistent proceedings.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana
JULY 1, 1959

II

JUDGMENT.

Extract from the Minutes of January 23, 1959.

FRANK S. BLACKFORD, as Trustee in Bankruptcy of MUNRO-VAN HELMS COMPANY.

No. 17243.

versus

COMMERCIAL CREDIT CORPORATION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed in part and affirmed in part; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings in accordance with the opinion of this Court.

It is further ordered and adjudged that the appellee, Commercial Credit Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

III

ORDER DENYING REHEARING

Extract from the Minutes of January 23, 1959.

FRANK S. BLACKFORD, as Trustee in Bankruptcy of MUNRO-VAN HELMS COMPANY,

No. 17243.

versus

COMMERCIAL CREDIT CORPORATION

Extract from the Minutes of April 10, 1959.

It is ORDERED that the petitions for rehearing filed by appellant and appellee in this cause be, and the same are hereby, denied.

IV

(1.) Alabama Assignment of Accounts Receivable Act.

Act No. 338 S. 174—Boutwell

An Act

To provide for the assignment of accounts receivable and for notice thereof; and to fix the rights and liabilities of the assignors and assignees of such accounts receivable and of the persons owing the same and of all persons interested therein, and to provide for the enforcement of such rights and liabilities; all in order to promote trade and commerce by facilitating the sale and pledge of accounts receivable and to eliminate fraud in connection with secret assignments.

Be It Enacted by the Legislature of Alabama:

Section 1. For the purpose of this Act the following words, unless the context or subject matter otherwise requires, shall have the following meanings:

"Account" means an account receivable. It includes a right to sums due or to become due on open accounts or contracts. It excludes sums due on and rights represented by judgments, notes, bills of exchange, drafts, acceptances or other negotiable or non-negotiable instruments or agreements for the payment of money, the transfer of which is commonly made by endorsement on and delivery of the instrument or contract; also sums due under and rights represented by a chattel mortgage, conditional sales contract or other instrument reserving title to or creating a lien upon property; and sums due or to become due for personal services of an employee; and sums due or to become due from the United States of America or any department or agency thereof; and monies arising from public or private construction contracts for which the assignor has furnished a surety bond guaranteeing the performance of the contract or the payment of labor and material claims arising therefrom; it also excludes any account (as hereabove defined) owned by any person who is not engaged in business or a profession.

"Assignment" includes any transfer, sale, pledge or mortgage of an account, or of a part thereof, by a person engaged in business or a profession.

"Assignor" includes transferor, seller, pledgor and mortgagor.

"Assignee" includes transferee, purchaser, pledgee, mortgagee, and persons with rights acquired from or through such assignee.

"Account debtor" means a person obligated to pay an account.

"Statement" shall mean any original statement or renewal statement provided for in Section 3 of this Act.

"Value" means any consideration sufficient to support a simple contract, including an antecedent debt or liability, whether an account is taken in satisfaction thereof or as security therefor.

"Proceeds in Any Form" of an account means any interest in, or benefit accruing from, the account, including: (a) a judgment arising from the account, (b) proceeds of any partial or complete payment of the account in money or otherwise, including any obligation taken as absolute or conditional payment of the account, (c) security subsequently taken for the account, and (d) goods the sale of which gave rise to the account, returned or not received by the account debtor.

Section 2. An assignment of an account transfers from the date of the making of the assignment all rights which the assignor has power to transfer and shall be and be deemed to be valid and fully perfected as of the date it is made, whether or not notice of the assignment is given to the account debtor or whether or not the account debtor assents to said assignment, if

(a) the assignment is in writing;

(b) the assignee has given value therefor; and

(c) the assignment be made within the effective period (as prescribed in Section 3 hereof) of a statement or renewal statement filed for record by assignee in the manner, and in accordance with the provisions of Section 3 hereof.

No existing or future creditor of the assignor, and no subsequent assignee of an account receivable, can or shall, after the making of such an assignment in accordance with the foregoing provisions of this Section 2, and during the effective period of any statement, renewal statement, or affidavit of continuance filed by the assignee as provided in Section 3 of this Act, acquire any right, title, lien or interest in or to such account, or any proceeds in any form thereof, equal or superior to or in diminution of the rights of the assignee under such assignment, except as hereinafter specified in the proviso to subsection 3 of Section 3.

Section 3. (1) Any person undertaking or having undertaken the acceptance of or contemplating the acceptance of assignment or assignments of accounts receivable is entitled to file, in the office of the Judge of Probate of the County as hereinafter provided, a statement, signed by the assignor and assignee of such accounts receivable, containing (a) a designation of the assignor and assignee, and of the principal place of business of each, within this state, if any; and (b) a statement that the assignor has assigned, or intends to assign to assignee, one or more accounts receivable.

The following form of statement (or any other form

of statement containing substantially the same information) shall suffice for the purposes of this Act, viz.:

"Statement of Assignment of Accounts Receivable.

Date

" has assigned or intends to assign one or more accounts receivable to in accordance with the Alabama Assignment of Accounts Receivable Act.

"The assignor is

(and individual, a corporation, a partnership)

The principle place of business of assignor in the State of Alabama is at

(Street Address) (City) (County)

"The assignee is

(and individual, a corporation, a partnership)

The principal place of business of assignee is at

(Street Address) (City) (County)

(Assignor) (Assignee)

Such statement shall be filed in the office of the Judge of probate for the county in which assignor's principal place of business within this state is located.

(3) Presentation for filing of the Statement prescribed in subsections 1 and 2 of this Section 3, and payment of the filing fee, shall constitute filing under this Act, in favor of the assignee, as to all accounts receivable assigned by assignor to assignee in accordance with the provisions of Section 2, and which shall be assigned within one year after the date of such filing, which period of one year shall be the effective period of such statement as sometimes referred to in this Act.

Assignments of accounts made after the effective date of this Act shall be inoperative against creditors and purchasers without notice until the statement prescribed in subsections 1 and 2 of this Section 3 (or renewal of notice or affidavit of continuance as provided by this Act) shall be filed for record in accordance with the provisions of this Act.

(7) Any document herein authorized to be filed for record shall be operative as a record from the time that the same is filed with the Judge of Probate of the County in which the assignor has his principal place of business and the fee prescribed herein shall be paid, and shall operate from that time as a notice of the contents of such document and of the consequences of the filing thereof under the terms of this Act.

Section 4. Whenever, prior to actual notice to him of an assignment of an account, the account debtor shall have

(a) made payment of the account, in whole or in part; or

(b) given a negotiable instrument in payment or as evidence, in whole or in part thereof, which negotiable instrument shall not be assigned to the assignee of the account; or

(d) become liable upon a final judgment thereon; such payment or the assumption or suffering of such substitute liability shall, to the extent thereof, be a good and valid discharge of the account debtor's liability upon such account. Further, the rights of the assignee as against the account debtor shall be subject

to all payments, set-offs, and discounts had or possessed by the account debtor against the account previous to notice to the account debtor of the assignment.

Section 5. If an account is assigned as provided in Section 2, during the effective period of any recorded statement as provided in Section 3, the assignor, and any junior assignee of the account, shall be liable and accountable to the assignee under such assignment for all proceeds in any form of such account thereafter received by such assignor or junior assignee during the period of the validity of such statement, or any renewal thereof of any affidavit of continuance or renewal thereof; and any such assignor or junior assignee who after the date of such assignment, and during such period of validity of such statement, renewal statement, affidavit of continuance or renewal thereof, obtains the proceeds in any form of such account, shall be deemed to have received, effected or ol ained the same for the use and benefit of the assignee under such assignment and shall be liable and accountable to him therefor.

Section . Neither dealing by the assignor, with property i nhis possession the sale of which gave rise to an account, as his own property, nor the assignor's granting to the account debtor of credits, allowances, or adjustments shall invalidate either the assignment of the account as to the balance of the account nor the assignment of other accounts, whether or not the assignee consents to or acquiesces in such acts of the assignor. The term "assignor" as used in this section includes any assignee or other successor in interest of

the assignor, whose rights are subordinate to those of the assignee mentioned above in this section.

Section 7. This Act shall not be construed as superseding or repealing any other laws effective in Alabama relating to the subject matter covered by this Act, but shall be held and construed to be cumulative, except that it is expressly enacted and declared that any provision of law providing for the recording upon the public records of an assignment of accounts, or any notice thereof contrary to the provisions hereof, or providing for the perfecting of title to assigned accounts in any assignee by any method, whether by notice to the account debtor or otherwise, be and the same is hereby repealed, it being expressly declared that the purpose of this statute is to provide an exclusive method whereby the assignees of accounts receivable may perfect title thereto against creditors and other assignees of the assignor, subject to and in accordance with the provisions of this Act.

Section 8. If any provisions of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 9. This Act shall be known and may be cited as the "Alabama Assignment of Accounts Receivable Act."

Section 10. This Act shall become effective sixty (60)

days after its passage and approval by the Governor or upon its otherwise becoming a law:
Approved August 8, 1949.
Time 10:15 A. M.

(ii) **Alabama Laws Relating to Admission of Foreign Corporations.**

(a) **Section 232, Article 12, Constitution of Alabama, 1901.**

"Sec. 232. No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association . . . ."

(b) **Section 192, 8itle 10, Code of Alabama, 1940.**

"§192. (7209 (3642) (1316) **Foreign corporation must file instrument of writing designating agent and place of business in this state.**—Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file with the secretary of state a certified copy of its articles of incorporation or association and file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall amend its articles of incorporation or association, or shall abandon or change its place of business as desig-

nated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state,"

(c) § 340. **Statement filed with department of revenue.**—Such foreign corporation shall, at the time of paying such tax, file in the office of the department of revenue an instrument of writing under the seal of the corporation and signed officially by the president or other chief officer and the secretary of such corporation, showing the name of the corporation, and the state or county under whose laws it was incorporated, the amount of the total authorized capital of such corporation, the total amount of the actual paid-in capital of such corporation, its principal place of business, the name of the authorized agent of such corporation in this state, and the post office address of such authorized agent of such corporation in this state and the location of the principal place of business of such corporation in this state, ... which statement shall be sworn to by such president or other executive officer and the secretary of said corporation, before some officer authorized under the laws of this state to administer oaths or take acknowledgment of conveyances.

(d) § 345. **Foreign corporations.**—Every foreign or non-resident corporation and all corporations organized under or by authority of the laws of any state or government other than the State of Alabama, in addition to other license and privilege taxes required to be paid by law, and for the purpose of registration and to prevent the duplication of names and in order to secure for the public record, for taxation, and for other

purposes, the names and addresses of the said corporations and individual officers thereof, shall be required to procure from the department of revenue when it is admitted or authorized by law to do business, and annually thereafter, a permit, which permit shall be prepared by and countersigned by the comptroller, and shall be delivered by the comptroller to the department of revenue in a well-bound book with the stub and blanks therein showing the date thereof, the names of the corporations when issued, and the character of business engaged in by said corporation . . . . . No corporation, its agents, officers or servants shall transact any business for or in the name of such corporation within the State of Alabama without having first procured said permit and all contracts, engagements or undertakings or agreements with, by or to such corporations made without obtaining such permit shall be null and void. Application for said permit shall be made by said corporations as provided by law, giving the name and address of said corporation, its principal place of business in Alabama; its agent upon whom process can be served, his address and the names of the president and secretary of said corporation, and the name and address of its directors residing in Alabama. Strictly benevolent, educational or religious corporations shall not be required to pay such permit fee. (1935, p. 256.)

Cross reference.—As to exemption of property of religious, etc., corporations from ad valorem taxation, see § 2 of this title.

(iii) **Alabama Statutes Dealing With Fraudulent**

Conveyances.

(a) **Section 1, Title 20, Code of Alabama, 1940.**

"§ 1. (8032) (4287) (2150) (1730) (2120) (1861) (1550) **Conveyances of personal property in trust for the grantor are void as to creditors.**—All deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, are void against creditors, existing or subsequent, of such person."

(b) **Section 7, Title 20, Code of Alabama, 1940.**

"§ 7. (8038) (4293) (2156) (1735) (2124) (1865) (1554) **All instruments made to hinder, delay, or defraud persons, void as to them.**—All conveyances, or assignments in writing, or otherwise, of any estate or interest in real or personal property, and every charge upon the same, made with intent to hinder, delay, or defraud creditors, purchasers, or other persons of their lawful suits, damages, forfeitures, debts, or demands; and every bond, or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, against the persons who are or may be so hindered, delayed, or defrauded, their heirs, personal representatives and assigns, are void."

(iv) **Alabama Statutes Relating to Usury.**

(a) **Section 60, Title 9, Code of Alabama, 1940.**

"§ 60. (8563) (4919) (2626) (1750) (2088) (1827) (1519) **Rates of interest fixed at six and eight percent.**

—The rate of interest upon the loan or forbearance of money, goods or things in action, except by written contract, is six dollars upon one hundred dollars for one year, and the rate of interest by written contract is not to exceed eight dollars upon one hundred dollars for one year; and at that rate for a greater or less sum, or for a longer or shorter time."

(b) **Section 65, Title 9, Code of Alabama, 1940.**

"§ 65. (8567) (4623) (2630) (1754) (2092) (1831) (152") **Interest on usurious contracts; recovery back of usury.**—All contracts for the payment of interest upon the loan or forbearance of goods, money, things in action, or upon any contract whatever, at a higher rate than is prescribed in this chapter, are usurious and cannot be enforced either at law or in equity, except as to the principal. Nor shall the borrower of money at a usurious rate of interest ever in any case in law or equity be required to pay more than the principal sum borrowed, and if any interest has been paid the same must be deducted from the principal and judgment rendered for the balance only. Provided, however, that the defense of usury may not be pleaded against a holder of any negotiable instrument, in due course."

(v) **Factor's Lien**

Section 132 (2), Title 47, Code of Alabama, 1940, as Amended.

"§ 132 (2). **Continuing lien of factor on materials, goods in process, merchandise and proceeds of sale sale thereof; recordation of notice of lien.**—If so pro-

vided by any written agreement, all factors shall have a continuing general lien upon all materials, goods in process and merchandise from time to time consigned to or pledged with them, whether in their constructive, actual or exclusive occupancy or possession or not, and upon any accounts receivable or other proceeds resulting from the sale or other disposition of such materials, goods in process, and merchandise, for all their loans and advances to or for the account of the person creating the lien (hereinafter called the 'borrower'), . . . provided that a notice of the lien is recorded, stating: (a) The name of the factor, the name under which the factor does business, if an assumed name; the principal place of business of the factor within the state, or if he has no place of business within the state, his principal place of business outside of this state; . . ."

Section 132 (3), Title 47, Code of Alabama, 1940, as Amended.

"§ 132 (3). **Notice to be verified; how and where recorded.**—Such notice must be verified by the factor or his agent, to the effect that the statements therein contained are true to the best of his knowledge. It must be recorded in the office of the judge of probate in the county where the materials, goods in process, or merchandise subject to the lien are or at any time shall be located, kept or stored, and also, if the factor has an office or principal place of business in the state, in the county where such principal office or place of business of the factor within the state is or at any time shall be located. . . ."

Section 132 (8), Title 47, Code of Alabama, 1940, as Amended.

"§ 132 (8). **How §§ 132 (1) to 138 (8) construed; substantial compliance.**—Sections 132 (1) to 132 (8) of this title are to be construed liberally to secure the beneficial interest and purposes thereof. A substantial compliance with their several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same. . . ."

(vi) Statutes of the Bankruptcy Act.

"§ 60. **Preferred Creditors.** a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon which property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so

perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

— (7) Any provision in this subdivision a to the contrary notwithstanding if the applicable law requires a transfer of property other than real property for or on account of a new and contemporaneous consideration to be perfected by recording, delivery, or otherwise, in order that no lien described in paragraph (2) could become superior to the rights of the transferee therein, or if the applicable law requires a transfer of real property for such a consideration to be so perfected in order that no bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee, the time of transfer shall be determined by the following rules:

I. Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within whic hrecording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer.

II. Where compliance with the law applicable to the transfer is not had in accordance with the provisions of subparagraph I, the transfer shall be deemed to be

made or suffered at the time of compliance therewith, and if such compliance is not had prior to the filing of the petition initiating a proceeding under this Act, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition."

§ 70. Title to Property.

"c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

. . . . .

"e. (1) A transfer made or suffered or obligation incurred by a debtor under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and

estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: **Provided, however,** That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision (e) is valid under applicable Federal or State laws.

(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 198

FRANK S. BLACKFORD, AS TRUSTEE IN BANKRUPTCY OF MUNRO-VAN HELMS COMPANY,

Petitioner

vs.

COMMERCIAL CREDIT CORPORATION,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

SUBJECT INDEX

	Page
Table of Authorities	ii
Brief in Opposition	1
Opinions Below	1
Jurisdiction	3
Questions Presented	3
Statement	5
Reasons for Denial of Petition	7
(1) Matter correctly decided below after full consideration	7
(2) Petition seeks to review finding of fact	10
(3) Case involves interpretation of state law which should not be disturbed	10
(4) Case does not warrant review by Supreme Court	10
Conclusion	12

TABLE OF CASES CITED

	Page
Adkins v. Bynum, 109 Ala. 281, 19 So. 400	9
Blackford v. Commercial Credit Corp., 263 F. (2d) 97	2
District of Columbia v. Sweeney, 310 U.S. 631, 60 S.C. 1082	11
Magnum Import Company v. Coty, 262 U.S. 159, 43 S.C. 531	10-11
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S.C. 614	10
Second National Bank of Houston v. Phillips (5th Circuit) 189 F. (2d) 115	8
Southern Power Company v. North Carolina Public Service Co., et al, 263 U.S. 508, 44 S.C. 164	10
Spiegel's Estate et al v. Commissioner of Internal Revenue, 335 U.S. 701, 69 S.C. 301	10
Tezel & Carter v. Roark (Texas) 301 S.W. (2d) 179	8
Warner v. Goltra, 293 U.S. 156, 55 S.C. 41	7

STATUTES CITED

Section 70, Bankruptcy Act, 11 U.S.C.A. 110	1
Section 60, Bankruptcy Act, 11, U.S.C.A. 96	2
1949 Acts of Alabama, p. 503, Act 338 (Petition, p. 40)	3
Alabama Accounts Receivable Act, Title 39, Sections 207 et seq. Code of Alabama 1940 as Amended (Petition, p. 40)	4
Sections 1 and 7, Title 20, Code of Alabama (Petition, p. 51)	4

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

This is a plenary suit by the Trustee in Bankruptcy (Petitioner) against a secured creditor (Respondent) of the Bankrupt to recover as voidable transfers under Section 70 of the Bankruptcy Act (11 U.S.C.A. 110) amounts of money representing collections made by the creditor on accounts receivable validly assigned to it by the Bankrupt.

The District Court's opinion, while not reported, is in the Record in two parts. The following may be of help to

determine what was and what was not decided below so as to clarify the issues before this Court.

One part, (R. pp. 593 to 601), after a trial on the merits deals with Petitioner's claim of invalidity as to assignments of accounts prior to bankruptcy, the assignments being for adequate value to secure concurrent loans, which accounts were paid to the Respondent either after bankruptcy or within the four-month period before bankruptcy. The District Court held this financing to be in conformity with applicable Alabama law, and a valid security arrangement as against the Petitioner. The Court of Appeals affirmed in Part III (A) and (B) of its opinion. *Blackford v. Commercial Credit Corporation*, 263 Fed. (2) 97.

The other part, (R. pp. 606-607, 609), by summary judgment in favor of Respondent, deals with Petitioner's claim of invalidity of assignments of accounts similarly assigned more than four months prior to bankruptcy and which were paid to the Respondent more than four months before bankruptcy. The Court of Appeals in Part IV (A) of its opinion reversed and remanded this phase of the case so that some alleged differences, (non-existent in Respondent's judgment), between these accounts and those involved in the other part could be inquired into in a trial.

The District Court also decided by summary judgment in favor of Respondent (R. p. 607) that, as to all claims of the Petitioner, none of the assignments were vulnerable to attack by Petitioner on any theory of being either fraudulent transfers, actual or constructive, or of being in fraud of creditors under Alabama law. The Court of Appeals affirmed in Part III (B) and Part IV (B) of its opinion.

The Court of Appeals also decided in Part VI (A) of its opinion that usury was not present in the financing arrangement, and in Part V that no preferential transfers under Section 60 of the Bankruptcy Act (11 U.S.C.A. 96)

were involved in the case. No serious attempt was made to prove Respondent had reasonable cause to believe the Bankrupt was insolvent prior to August 3, 1953, bankruptcy having occurred July 30, 1953.

JURISDICTION

The Petition erroneously brings before this Court the entire controversy between the parties. As is obvious from the opinions below, no final adjudication has been had as to one part of the case. Petitioner's Statement in Paragraph (g) (ii) (Petition, p. 19) overlooks the fact that the case was remanded in part. The Petition must be considered as confined to the affirming portion of the opinion of the Court of Appeals.

QUESTIONS PRESENTED

The lending arrangement herein and the series of assignments of accounts thereunder and the receipt of collections by Respondent, was the normal revolving non-notification accounts receivable financing in widespread use today, plus publication thereof with resulting notoriety under a notice-filing type of statute enacted in 1949 in Alabama, where the Bankrupt resided. Pursuant to that statute, (Title 39, Sections 207-214, Code of Alabama, 1940, as amended, 1949 Acts of Alabama 503, Act 338—Petition, p. 40) a Statement of Assignment of Accounts Receivable, duly executed by the Bankrupt as assignor and the Respondent as assignee, in precisely the form prescribed therein, was properly filed in the office of the Probate Judge of Talladega County, Alabama. The filed Statement showed as the principal place of business of the assignee its address at 200 West Baltimore Street, Baltimore, Maryland, which in fact was its principal place of business for handling accounts receivable, financing and from which all of the business involved in this case was conducted.

Petitioner contended (a) that the designation in the publicly filed Statement of the Baltimore address, (incidentally the only address at which information concerning the Bankrupt's account could have been secured) was incorrect and voided the effectiveness of the filed Statement and (b) that the assignments of accounts receivable, even though publicized and for a valuable concurrent consideration were void under the Alabama Fraudulent Conveyance Statute, Title 20, Sections 1 and 7, Code of Alabama 1940 (Petition, p. 51).

The District Court rejected all of Petitioner's contentions and the Court of Appeals affirmed.

The questions presented are:

1. What is meant by the phrase "principal place of business" as used in the Alabama Accounts Receivable Statute, (Section 209, Title 39, Code of Alabama, 1940, as amended, Section 3, Act No. 338, Acts of Alabama, 1949—Petition, Appendix p. 40) as applied to Respondent, a Maryland corporate assignee which handles the business in question out of its Baltimore office by there accepting assignments and making loans thereon by depositing same in the Bankrupt's bank account in a Baltimore bank, and which is qualified and has several independent, autonomous offices in Alabama for other purposes, none of which is in fact a principal office *vis-a-vis* its other offices or handle the type of financing business here involved or had any knowledge or information concerning the particular transactions here involved.

2. Is a normal non-notification accounts receivable financing arrangement a fraudulent transaction and void under Title 20, Sections 1 and 7, Code of Alabama, 1940 where accounts are assigned for an adequate and concurrent consideration, where the entire arrangement is duly publicized under applicable local notice—filing statute

and where there is absolutely no evidence of fraud or of any fraudulent intent or of any intent to hinder, delay or defraud creditors.

STATEMENT

In spite of the size of the Record, there is no real or substantial conflict as to the facts in this case. For a convenient reference, the situation of the parties and the operation of the financing arrangement can be gathered almost entirely from the affidavit of Mr. Ortel at page 321.

Commercial Credit Company, Inc. of Maryland, a Maryland corporation, with an office at 200 West Baltimore Street, Baltimore, Maryland, entered into an accounts receivable contract in Baltimore, Maryland, on May 19, 1949, with Munro-Van Helms, under which it agreed to lend to Munro-Van Helms 85% of the face amount of accounts receivable assigned and delivered to it at its office in Baltimore. Loans under this contract were advanced to Munro-Van Helms by being deposited in Munro-Van Helms' bank account in Baltimore, Maryland, at the Union Trust Company, with duplicate deposit slips being mailed to Munro-Van Helms in Alabama.

Commercial Credit Company, Inc. of Maryland never had any office or did any business in Alabama and was not qualified as a foreign corporation in that State.

Under the Alabama Assignment of Accounts Receivable Statute, effective October 7, 1949, both parties duly filed in the office of the Probate Judge of Talladega County, Alabama, a Statement of Assignment of Accounts Receivable, which was duly renewed or refiled each year thereafter, said Statement indicating that the principal office of Commercial Credit Company, Inc. of Maryland

was at 200 West Baltimore Street, Baltimore, Maryland the correct address of said company.

On December 31, 1952, Commercial Credit Company, Inc. of Maryland was merged and liquidated into its parent corporation, Commercial Credit Corporation, a Maryland corporation, which assumed its predecessor's contract with Munro-Van Helms, to which assumption Munro-Van Helms agreed. In accordance therewith, Commercial Credit Corporation, a Maryland corporation, and Munro-Van Helms executed and duly filed in Talladega County, Alabama, on December 31, 1952, a Statement of Assignment of Accounts Receivable showing as the assignee's principal place of business, 200 West Baltimore Street, Baltimore, Maryland. The financing arrangement continued to be handled exclusively and entirely from that office as theretofore. All Munro-Van Helms contacts with Commercial Credit Corporation were with this office, assignment schedules were continued to be mailed to that office and loans were made from that office by deposit in Munro-Van Helms' bank account in Baltimore, as aforesaid.

Commercial Credit Corporation, the parent corporation, had been qualified as a foreign corporation in Alabama since 1945 and had several offices in that State, but none of those offices knew of or had anything to do either with the Munro-Van Helms contract or any commercial or accounts receivable financing whatsoever. These Alabama offices dealt only with matters of consumer credit such as small loans and automobile and domestic appliance sales financing. Each of these offices was completely independent of the others and none was a principal place of business with respect to the other offices in Alabama. The District Court so found, affirmed by the Court of Appeals. Commercial Credit Corporation also designated as an agent for service of process in Alabama the members of the law

firm of Ball and Ball in the First National Bank Building at Montgomery, Alabama, and, in accordance with Alabama Constitution and statute respecting qualification of foreign corporations, designated their office address as the address at which the resident agent resided, but this law office was never even a place of business of Commercial Credit Corporation.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES BEFORE THIS COURT WERE CAREFULLY AND EXTENSIVELY CONSIDERED IN THE COURTS BELOW AND THE AFFIRMING OPINION OF THE COURT OF APPEALS IS CORRECT

The only objections urged to the validity of this financing arrangement are that:

(a) there was a failure to comply with the Alabama assignment statute in that the publicly filed notice of Dec. 31, 1952 stated an incorrect, but not a false or misleading address for the assignee; and

(b) the arrangement even though for value and without any evidence of fraud was nevertheless void as a constructive fraud.

The Court of Appeals most thoroughly and completely considered both of these issues as is obvious from its opinion and answered both adversely to Petitioner.

On the first point, the words "principal place of business" are not words of art. They should be given their ordinary and common understanding in the light of the purpose of the statute (*Warner vs. Goltra* 293 U. S. 156) as meaning the place of business of the assignee where the business under consideration was handled, in fact the only place of

business from which information concerning the matter could be secured. See, *Second National Bank of Houston vs. Phillips* (5th Cir.) 189 Fed. (2) 115 and *Tezel and Carter vs. Roark (Texas)* 301 S.W. (2) 179. Under the plain words of the statute, insofar as the assignee is concerned, the address did not have to be an Alabama address.

As among the six other offices of Respondent in Alabama, none of which ever did or had anything at all to do with the type of business here under consideration, and none of which knew anything about the particular financing arrangement with the Bankrupt, not any one of those offices was a principal place of business. Each of such offices was autonomous and completely independent of the other offices. Petitioner's arbitrary choice of the Montgomery, Alabama office at 219 Church Street, on the basis of volume of business done, (Petition, p. 15), is absurd since annual fluctuation of volume of business could have a principal place of business so determined shifting from year to year. Actually, Birmingham was the first office opened in Alabama but Petitioner does not suggest that that was the principal place of business since, in fact, it was no more so than Montgomery.

Certainly, neither the Bankrupt or its Trustee or any of its creditors were in any way misled or capable of being misled in any particular whatsoever by the stated address of the assignee in its filed notice. Had any other address been given, such as any office in Alabama, there was the real possibility that inquiry to such office might have resulted in a disclaimer of any financing arrangement with the Bankrupt based on complete lack of knowledge. This would have seriously misled any inquirer. Had any other address been stated in the filed Statement, the Trustee would now be contending that that address was wrong and the Baltimore address where information was available should have been used.

The indication in Respondent's franchise tax returns to a principal office in Montgomery refers to the office of a law firm which was the office of the required designated agent for service of process. These tax returns are not documents filed for public information or required to be filed to convey notice to the public, and no matter what was stated therein, it would be immaterial for present purposes.

The Alabama Constitution requires that every foreign corporation have a resident agent for service of process, with a stated address at which such agent must reside. This address need not be a place of corporate business. Alabama statutes with respect to domestic corporations do require the designation of a statutory "principal office", but with respect to foreign corporations, only require the designation of a "known place of business", at which the resident agent for process must be located. Therefore, the words used in the Alabama Assignment of Accounts Receivable Act requiring indication by the assignee in the publicly filed statement of a "principal place of business", which, with respect to the assignee, need not be in Alabama, could not have meant anything in the nature of a statutory principal office or the address of its agent for process.

As to the second objection that the transfers were constructively fraudulent under local law, this is fully answered by the application of the rules laid down in *Adkins vs. Bynum (Ala.)* 109 Ala. 251, 19 So. 400.

If Petitioner's contention on this point was carried to its logical conclusion, it would mean that every security arrangement involving a transfer of title to the securing property would be constructively fraudulent and void. This would completely preclude any security in any kind of intangible property. Such a result is absurd

2

THE PETITION SEEKS REVIEW WITH REFERENCE TO A QUESTION OF FACT SETTLED BELOW

The issue of whether Respondent's address in the publicly filed Statement was its "principal place of business" is a mixed question of law and fact and the District Court found as a fact that the Respondent had no principal place of business in Alabama.

The Supreme Court, of course, does not review questions of fact. *Southern Power Company vs. North Carolina Public Service Co., et al.*, 263 U.S. 508; 44 S.Ct. 164.

3

THE COURT SHOULD LEAVE UNDISTURBED INTERPRETATION OF LOCAL LAW

It is the policy of the Supreme Court to leave undisturbed the holding of a Court of Appeals on a question of interpretation of state law. *Spiegel's Estate, et al. vs. Commissioner of Internal Revenue*, 335 U.S. 701, 708; 69 S.Ct. 301, 304.

4

THIS CASE DOES NOT WARRANT REVIEW BY THE SUPREME COURT

Supreme Court Rule 19 which specifies the elements necessary to determine whether a case merits consideration requires the existence of "special and important reasons" (*Rice vs. Sioux City Memorial Park Cemetery, Inc.* 349 U.S. 70, 75 S.Ct. 614) for granting of the Writ. The Court does not sit for the benefit of the particular litigants (*Mag*

nam Import Company vs. Coty 262 U.S. 159, 163; 43 S.Ct. 531), and "special and important reasons imply a reach to a problem beyond the academic or the episodic" *(Rice vs. Sioux City Memorial Park Cemetery Inc., supra)*. The Writ should not issue where the question before the Court is not of public importance. *District of Columbia vs. Sweeney*, 310 U.S. 631, 60 S.Ct. 1082.

The Petition (pp. 43-44) to the contrary notwithstanding, this case presents nothing more than a simple issue of interpretation of local law, in part already settled by local state court decisions, it is not of public importance, it does not involve any question of constitutional rights or privileges, it does not present any problem of recurring significance in the field of bankruptcy law or one whose decision by this Court would aid in the orderly and proper administration of bankruptcy estates; it does not even involve a question of construction of any provision of the Bankruptcy Act, and the opinion of the Court of Appeals on the issues before this Court is not in conflict with the opinion of any other Circuit requiring a solution by this Court of such conflict.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I, Benjamin Leader, one of the attorneys for Commercial Credit Corporation, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4 day of August, 1959, I served copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari on Morris K. Sirote, Esq., and also on Francis H. Hare, Esq., counsel of record for the Petitioner in said cause, by mailing said copies in duly addressed envelopes, with first class postage prepaid, to said Morris K. Sirote, Esq., at 1142 Brown Marx Building, Birmingham, Alabama, his post office address, and to Francis H. Hare, Esq., at 703 Comer Building, Birmingham, Alabama, his post office address.

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